GENERAL STATUTES OF NORTH CAROLINA

1984 INTERIM SUPPLEMENT


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UNDER THE DIRECTION OF
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AND K.S. MAWYER

To Be Used With the 1983 Cumulative Supplement

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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1984 Extra Session and the 1983 (Regular Session, 1984) Session of the General Assembly affecting Chapters 1 through 168 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 310, p. 631.
North Carolina Court of Appeals Reports through Volume 67, p. 197.
South Eastern Reporter 2nd Series through Volume 315, p. 412.
Federal Reporter 2nd Series through Volume 733, p. 92.
Bankruptcy Reports through Volume 38, p. 767.
Federal Supplement through Volume 583, p. 612.
Federal Rules Decisions through Volume 101, p. 159.
Supreme Court Reporter through Volume 104, p. 2402.
North Carolina Law Review through Volume 62, p. 851.
Wake Forest Law Review through Volume 19, p. 956.
Campbell Law Review through Volume 5, p. 472.
Duke Law Journal through 1983, p. 1142.
North Carolina Central Law Journal through Volume 14, p. 113.
Opinions of the Attorney General.

Preface

This 1984 Interim Supplement to the General Statutes of North Carolina contains the general and permanent laws enacted at the 1984 Extra Session, which was held in March, 1984, and the 1983 (Regular Session, 1984) Session, which was held in June and July, 1984. In addition, this Supplement contains annotations from cases decided since the preparation of the 1983 Cumulative Supplement and available in advance sheets on or before July 1, 1984, references to opinions of the Attorney General, and recent amendments to the rules in the Appendices in Volume 4A.

The General Statutes of North Carolina
1984 Interim Supplement

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For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

I. IN GENERAL.

In general a cause of action accrues, etc. —

An action based on personal injury must be commenced within three years of the date on which the claim accrued. For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

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§ 1-21. Defendant out of State; when action begun or judgment enforced.

CASE NOTES

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The second sentence of this section, the "borrowing statute" element, limits the effect of the first sentence by applying the foreign state's statute of limitation in those situations where the foreign statute would bar the action; in other words, the "borrowing statute" will prevent a plaintiff from retaining the right to sue indefinitely. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

Claim Arising Out-of-State against Nonresident. — This section has been construed to mean that if the cause of action arises in another state against an out-of-state defendant, then the statute of limitation does not begin to run until the nonresident defendant comes into this State so that he or she is subject to the personal jurisdiction of this State's courts. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

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Limitations, Real Property.

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CASE NOTES

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Exercise of Dominion Required. — The adverse possession must constitute an exercise of dominion over the land, making the ordinary use and taking the ordinary profits of which it is susceptible, and must subject the claimant during the whole statutory period to an action in ejectment. Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

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CASE NOTES

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III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

Absent Actual Ouster, etc. —

Before a person can adversely possess land held in cotenancy, there must be an ouster of his cotenants. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Constructive Ouster. — North Carolina adheres to the rule of constructive ouster. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

The rule of constructive ouster presumes the requisite ouster and is as follows: where one tenant in common and those under who he claims have been in sole and undisturbed possession and use of the land for 20 years and where there has been no demand for rents, profits or possession. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Upon completion of the statutory period, the constructive ouster relates back to the initial taking of possession. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

§ 1-42.9. Ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.

(b) This marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all fee simple oil, gas or mineral interests in the area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 30 years or more prior to September 1, 1983, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity. Provided, however, that any fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1983, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of the oil, gas or mineral interest and gives the book and page where recorded. This notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein the area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make the property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. The notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral leases.

(f) This section applies to a county that failed to publish a notice as required by subsection (e) but that published a notice of this section in a newspaper having general circulation in the county once a week for four consecutive weeks prior to September 1, 1984. In applying this section to that county, however, the date "1984" shall be substituted for the date "1983" each time it appears in this section. (1983, c. 502; 1983 (Reg. Sess., 1984), c. 1096, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, deleted a period following "taken by his successors in interest free and clear" near the beginning of the first sentence of subsection (b), substituted "leases" for "releases" at the end of subsection (c) and added subsection (f).

Article 5.

Limitations, Other than Real Property.

§ 1-47. Ten years.

CASE NOTES

I. IN GENERAL.

Stated in Bruce v. North Carolina Nat'l Bank, 62 N.C. App. 412, 303 S.E.2d 561 (1983).

IV. SEALED INSTRUMENTS.

B. Counterclaims.

Failure to denominate a claim as a counterclaim does not preclude its treatment as such. Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984).

§ 1-50. Six years.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Cited in Tetterton v. Long Mfg. Co., — N.C. App. —, 313 S.E.2d 250 (1984).

VI. DEFECTIVE PRODUCTS.

Subdivision (6) as Statute of Repose. — Subdivision (6) of this section is not a statute of limitation but is instead merely a "statute of repose" that places an outer limit on the time period within which a products liability action may be brought. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

§ 1-52. Three years.

CASE NOTES

I. IN GENERAL.

Statute Begins to Run, etc. — The limitations period does not begin to run, of course, until the injured party is at liberty to sue. Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983).

Subdivision (2) Governs Actions under 42 U.S.C. §§ 1981 and 1983. — Since there is no federal statute of limitation governing 42 U.S.C. §§ 1981 and 1983, the appropriate limitation period is the most relevant period provided by State law. The most relevant period provided by North Carolina law is subdivision (2) of this section. Lugo v. City of Charlotte, 577 F. Supp. 988 (W.D.N.C. 1984).

Applied in Bruce v. North Carolina Nat'l Bank, 62 N.C. App. 724, 303 S.E.2d 561 (1983); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); Seawell v. Miller Brewing Co., 576 F. Supp. 424 (M.D.N.C. 1983); Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983); Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984); Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984); Pearce v. North Carolina State Hwy. Patrol Voluntary Pledge Comm., — N.C. —, 312 S.E.2d 421 (1984).

Quoted in Pearce v. North Carolina State Hwy. Patrol Voluntary Pledge Comm., 64 N.C. App. 120, 306 S.E.2d 796 (1983).

Stated in Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984); Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Cited in Coker v. Basic Media, Ltd., 63 N.C. App. 69, 303 S.E.2d 620 (1983); Hoch v. Young, 63 N.C. App. 480, 305 S.E.2d 201 (1983); Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218 (1983); Norlin Indus., Inc. v. Music Arts, Inc., — N.C. App. —, 313 S.E.2d 166 (1984).

II. CONTRACTS.

A. In General.

Breach of warranty claims which arose in other states are governed by subdivision (1) of this section since remedies are governed by the laws of the jurisdiction where the suit is brought. The lex fori determines the time within which a cause of action shall be enforced. Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983).

B. Actions to Which Section Applies.

Claims Involving Bodily Injury as Essential Element. — The North Carolina Supreme Court has declined to apply § 25-2-725 to such claims where bodily injury to the person is an essential element of the cause of action and has instead adopted as the appropriate statute of limitation the three-year period contained in § 1-52(1). Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

IV. TRESPASS UPON REALTY.

Meaning of "Continuing Trespass". — In accord with original. See Bishop v. Reinhold, — N.C. App. —, 311 S.E.2d 298 (1984).

Wrongful maintenance of a portion of the defendants' dwelling house on the plaintiffs' lot is a separate and independent trespass each day it so remains and the three-year statute for removal begins to run each day the encroaching structure remains upon the plaintiffs' land. Any action to remove the encroachment, as in an action for compensation for the easement, or for the fee by adverse possession would not be barred until defendants had been in continuous use thereof for a period of 20 years so as to acquire the right by prescription. Bishop v. Reinhold, — N.C. App. —, 311 S.E.2d 298 (1984).

VI. INJURY TO PERSON OR RIGHTS OF ANOTHER.

Subdivision (5) Applicable Absent Other Specific Limitation. — On its face, subdivision (5) of this section appears to apply to all actions for personal injuries that are not specifically enumerated elsewhere in a distinct statute of limitation. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Applicability of Three-Year, etc. — An action to recover for personal injuries negligently inflicted must be commenced within three years from the date on which the action accrues. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Exclusion of Testimony. — The trial court in a negligence action ruled correctly in excluding testimony where the time period inquired about was outside the three years prior to the institution of the action. Wells v. French Broad Elec. Membership Corp., — N.C. App. —, 315 S.E.2d 316 (1984).

X. FRAUD OR MISTAKE.

A. In General.

Actions involving fraud or mistake, etc. — The three-year statute of limitations for fraud or mistake does not commence to run

until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

XII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

§ 1-53. Two years.

CASE NOTES

I. IN GENERAL.

Applied in Cooke v. Town of Rich Square, 65 N.C. App. 606, 310 S.E.2d 76 (1983); Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

CASE NOTES

II. ACTIONS TO WHICH SECTION APPLIES.

Foreclosure of Tax Lien. — An action to foreclose a tax lien is a civil action and this section bars civil actions commenced more than 10 years after the action accrues. Bradbury v. Cummings, — N.C. App. —, 314 S.E.2d 568 (1984).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-69.1. Unincorporated associations and partnerships; suit by or against.

CASE NOTES

The requirements of this section are mandatory and failure to satisfy them is not exonerated by § 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Strict construction of this section requires that before an unincorporated assocation may gain the privilege of instituting a lawsuit in its common name, first there must be recordation of the necessary information required by § 66-68 and then allegation of its specific location. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

This section controls in conflict with section 66-71. — In the face of any irreconcilable conflict between the provisions of this section and § 66-71, this section, being the later enactment, will control or be regarded as a qualification of the earlier statute. The same

conclusion is reached when the subject matter of the two statutes is examined, since the more particular directives of this section would prevail over the general recordation provisions of § 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.4. Personal jurisdiction, grounds for generally.

CASE NOTES

I. IN GENERAL.

This section should be liberally, etc. —

This statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Legislature Intended Full Jurisdictional, etc. —

This statute is a legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution. Thus it is possible that a defendant's contact with this forum may be sufficient to satisfy the requirements of this section, but yet be insufficient to satisfy the requirements of due process. Lane v. WSM, Inc., 575 F. Supp. 1246 (W.D.N.C. 1983).

Due process, and not language, etc. —

Whether the exercise of jurisdiction pursuant to the long-arm statute comports with due process is the critical inquiry. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Due process requires, etc. —

In accord with 1st paragraph in original, see DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

The North Carolina Supreme Court has simplified the task of determining whether there is a long-arm statute authorizing the assertion of personal jurisdiction by holding that subdivision (1)(d) of this section applies to any defendant who meets the minimal contact requirements of International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Western Steer-Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

Determination of whether, etc. —

In accord with original, see DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

But Depends on the Particular Facts. —

In accord with 1st paragraph in original, see DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Fairness to Both Plaintiff, etc. —

Where the conduct giving rise to the cause of action against nonresident defendant occurred in North Carolina, material evidence and crucial witnesses are more likely to be located within this state. Further, the inconvenience to a corporate defendant in being forced to defend suit away from home is not overwhelming in today's mobile society. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Factors in Determining, etc. —

The criteria for determining whether sufficient minimum contacts exist include: the quantity, quality and nature of the contacts, the source and connection of the cause of action with the contacts and with the forum state; the interest of the forum state with respect to the activities and contacts of the defendant; an estimate of the inconvenience to the defendant in being forced to defend suit away from home; and the location of crucial witnesses and material evidence. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

The primary factors utilized in analyzing whether minimum contacts are present are the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts and two others, interest of the forum state and convenience. Western Steer-Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

Principal May Be Subjected, etc. —

In accord with original. See DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

A nonresident owner-principal is liable for his agent's acts, even though the principal has never entered this State. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Money payment is clearly, etc. — Money is a thing of value, and defendant's promise in the note to make payments to plaintiff in North Carolina was clearly a promise to deliver a thing of value within this State, and thus within the purview of this section. Wohlfahrt v. Schneider, — N.C. App. —, 311 S.E.2d 686 (1984).

For discussion as to application of this section, see Fireman's Fund Ins. Co. v. Washington, 65 N.C. App. 38, 308 S.E.2d 758 (1983).

Applied in Moore v. Wilson, 62 N.C. App. 746, 303 S.E.2d 564 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983).

§ 1-75.7. Personal jurisdiction — Grounds for without service of summons.

CASE NOTES

The concept of a general appearance should be given a liberal construction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Meaning of "General Appearance". — In accord with 2nd paragraph in original. See Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

CASE NOTES

Stated in Wallace Butts Ins. Agency, Inc. v. Runge, — N.C. App. —, 314 S.E.2d 293 (1984).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

CASE NOTES

I. IN GENERAL.

Applied in Fisher v. Lamm, — N.C. App. —, 311 S.E.2d 61 (1984).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.

CASE NOTES

Doctrine of Lis Pendens Stated. — Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

Trial.

§ 1-181. Requests for special instructions.

CASE NOTES

Judge Has Discretion, etc. — Where a requested instruction is not submitted in writing and signed pursuant to this section it is within the discretion of the court to give or refuse such instruction. State v. Harris, — N.C. App. —, 312 S.E.2d 541 (1984).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

§ 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.

CASE NOTES

Cited in Housing Auth. v. Clinard, — N.C. App. —, 312 S.E.2d 524 (1984).

§ 1-234. Where and how docketed; lien.

CASE NOTES

II. CREATION OF LIEN.

Mere rendition of a judgment will not constitute a lien.

In accord with original. See Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Docketing Fixes the Lien. —

A judgment lien in North Carolina is neither created nor perfected until it is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

No lien is created by a judgment until the judgment is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

CASE NOTES

I. IN GENERAL.

Purpose of Article. —

In accord with 2nd paragraph in original. See Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984).

A declaratory judgment action is designed to provide an expeditious method of procuring a judicial interpretation of written instruments, such as wills, contracts, statutes, and insurance policies. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984).

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

B. Actions in Which Declaratory Judgment Held Available.

Determination of Rights Under Zoning Ordinance. — It is fundamental under the Declaratory Judgment Act that a party who considers his rights to be affected by a zoning ordinance, in a situation where there can be no doubt that litigation involving him is imminent, does not have to wait to be sued, but that he may go to court, obtain a declaration of his rights under the ordinance and seek relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

§ 1-255. Who may apply for a declaration.

CASE NOTES

When parties have a genuine issue regarding rights and liabilities under a will, they are entitled to have them resolved; and where the trial court fails so to adjudicate, the cause will be remanded. Sherrod v. Any Child or Children Hereafter Born to Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983).

Court will not determine matters purely speculative. Sherrod v. Any Child or Children Hereafter Born to Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983).

§ 1-260. Parties.

CASE NOTES

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

§ 1-264. Liberal construction and administration.

CASE NOTES

Cited in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-271. Who may appeal.

CASE NOTES

I. IN GENERAL.

Applied in Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., — N.C. App. —, 314 S.E.2d 302 (1984).

§ 1-272. Appeal from clerk to judge.

CASE NOTES

Applied in Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983).

§ 1-276. Judge determines entire controversy; may recommit.

CASE NOTES

I. IN GENERAL.

This section does not apply to probate matters. In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

II. SCOPE OF COURT'S JURISDICTION AND AUTHORITY.

As If It Were Originally, etc. — In cases that originate before the clerk and

which are properly called "civil actions" or "special proceedings" as contemplated by the terms of this section, and when there is an appeal to superior court, the hearing is de novo in superior court. In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

For discussion of reviewability on appeal of the exercise of the powers granted a clerk of superior court for revocation of letters of administration, see In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

§ 1-277. Appeal from superior or district court judge.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Purpose of Section. —
The reason for the rules embodied in subsection (a) of this section and 7A-27(d)(1) is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. McKinney v. Royal Globe Ins. Co., 64 N.C. App. 370, 307 S.E.2d 390 (1983).

This section and § 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order unless such order deprives the appellant of a substantial right which he would lose if the order is not reviewed before final judgment. State v. Jones, — N.C. App. —, 313 S.E.2d 264 (1984).

"Substantial Right." —
In deciding what constitutes a substantial right, it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984).

Examples of when a substantial right is affected include cases where there is a possibility of a second trial on the same issues and where there is a possibility of inconsistent verdicts. Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984).

Applied in Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984).

Stated in Sanders v. George A. Yancey Trucking Co., 62 N.C. App. 602, 303 S.E.2d 600 (1983); Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983); Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Cited in Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983); Porter v. Matthews Enters., Inc., 63 N.C. App. 140, 303 S.E.2d 828 (1983); Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752 (1983); Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983); Wallace Butts Ins. Agency, Inc. v. Runge, — N.C. App. —, 314 S.E.2d 293 (1984).

II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

B. Interlocutory Orders.

Avoidance of Rehearing or Trial, etc. —
Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment, and the avoidance of trial is not a "substantial right" that would make such an interlocutory order appealable under this section or § 7A-27(d). Howard v. Ocean Trail Convalescent Center, — N.C. App. —, 315 S.E.2d 97 (1984).

When Interlocutory Orders Are Appealable. —
An interlocutory order is immediately appealable only when it affects a substantial right of the appellant. Helms v. Griffin, 64 N.C. App. 189, 306 S.E.2d 530 (1983).

An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment. Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

Order Denying Motion to Dismiss For Lack of Subject Matter Jurisdiction Is Not Immediately Appealable. — While subsection (b) of this section provides that appeal does lie from denial of a motion to dismiss for lack of personal jurisdiction, this does not apply to the denial of a motion challenging subject matter jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immedi-

ately appealable. Duke Univ. v. Bryant-Durham Elec. Co., — N.C. App. —, 311 S.E.2d 638 (1984).

There is no immediate right of appeal from an order compelling arbitration. Bluffs, Inc. v. Wysocki, — N.C. App. —, 314 S.E.2d 291 (1984).

D. Jurisdiction.

Subsection (b) Applies, etc. —

The provision in subsection (b) of this section for immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant applies to the State's authority to bring a defendant before its courts, not to challenges to sufficiency of process and service. Howard v. Ocean Trail Convalescent Center, — N.C. App. —, 315 S.E.2d 97 (1984).

Appeal as to Personal Jurisdiction, etc. —

Denial of the motion to dismiss for lack of in personam jurisdiction is immediately appealable. Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983).

An appeal from denial of a subsidiary motion, while the main motion is pending, would ordinarily be dismissed as interlocutory. Where the court expressly denies a subsidiary motion on the basis that it does not have authority to grant the relief sought in the main motion, such ruling is equivalent to a denial of the main motion. The order thus in effect determines the action, and is therefore immediately appealable. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

E. Injunctions.

An order granting or refusing, etc. —

For a defendant to have a right of appeal from a mandatory preliminary injunction, substantial rights of the appellant must be adversely affected. Otherwise, an appeal from such an interlocutory order is subject to being dismissed. Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

V. ILLUSTRATIVE CASES.

B. Appellant Not Entitled to Appeal.

Dismissal of Treble Damage Claim. — A plaintiff in an Unfair Trade Practices action has no right of immediate appeal from an interlocutory order dismissing her claim for treble damages. Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984).

§ 1-279. Manner and time for taking appeal in civil action or special proceeding.

CASE NOTES

The provisions of this section are jurisdictional. —

Rule 3(c) of the Rules of Appellate Procedure and subsection (c) of this section are jurisdictional. First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983).

§ 1-285. Undertaking on appeal; filing; waiver.

CASE NOTES

Cited in Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

§ 1-289. Undertaking to stay execution on money judgment.

CASE NOTES

Cited in Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984).

§ 1-294. Scope of stay; security limited for fiduciaries.

CASE NOTES

Cited in Oshita v. Hill, 65 N.C. App. 326, 308 S.E.2d 923 (1983); Corbett v. Corbett, — N.C. App. —, 313 S.E.2d 888 (1984).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-313. Form of execution.

The execution must be directed to the sheriff, or to the coroner when the sheriff is a party to or interested in the action. In those counties where the office of coroner is abolished, or is vacant, and in which process is required to be executed on the sheriff, the authority to execute such process shall be vested in the clerk of court; however, the clerk of court is hereby empowered to designate and direct by appropriate order some person to act in his stead to execute the same. The execution must also be subscribed by the clerk of the court, and must refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

(4) For Delivery of Specific Property. — If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

(C.C.P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C.S., s. 675; 1971, c. 653, s. 2; 1977, c. 649, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — The above is set out to correct an error in subdivision (4) of this section as set out in the bound volume.

CASE NOTES

Liens on Real Estate, etc. —
There is no lien on personal property in North Carolina until levy. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Forcible Entry to Execute Process on Personalty. — An officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, — N.C. —, 313 S.E.2d 569 (1984).

While it is true that § 1-480 permits forcible entry where property subject to claim and delivery is concealed, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to subdivision (4) of this section. Red House Furn. Co. v. Smith, — N.C. —, 313 S.E.2d 569 (1984).

Article 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.

CASE NOTES

This Article and § 45-21.1 et seq. Provide Exclusive Means of Foreclosure. — Foreclosure may be by judicial sale pursuant to this Article or, if expressly provided in the deed or mortgage, by power of sale under §§ 45-21.1 through 45-21.45. These statutes provide the exclusive means for foreclosure in North Carolina and it was error for the trial court to provide for foreclosure in any other manner. Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.28. Public sale; confirmation of sale.

CASE NOTES

Subdivision (a) (3) gives the clerk of court original jurisdiction over public sales ordered by such clerk. Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983).

Article 31.

Supplemental Proceedings.

§ 1-355. Debtor leaving State, or concealing himself, arrested; bond.

CASE NOTES

Applied in Stackhouse v. Paycheck, — N.C. App. —, 311 S.E.2d 705 (1984).

§ 1-363. Receiver appointed.

CASE NOTES

Applied in Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., — N.C. App. —, 314 S.E.2d 302 (1984).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.1. Nature of attachment.

CASE NOTES

Function of Writ. —

Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring the property of the defendant within the legal custody of the court in order that it may be subsequently applied to the satisfaction of any judgment for money which may be rendered against defendant in the principal action. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Part 2. Procedure to Secure Attachment.

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.

CASE NOTES

Perfection of Attachment by Alias and Pluries Order. — Without a valid levy, the order of attachment is not perfected so as to create a lien of attachment, but remains executory until tolled by judgment in the principal action, or until perfected by a levy under an alias or pluries order. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.16. Sheriff's return.

CASE NOTES

Applied in Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765 (1983).

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.

CASE NOTES

When an order of attachment is perfected by a levy, a lien of attachment is created thereby which establishes the lienor's claim as against all other creditors and subsequent lienors. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lien Enforceable Against Subsequent Purchasers. —

A person claiming under a conveyance or encumbrance executed subsequent to the docketing of the notice of the order with respect to the property conveyed or encumbranced takes subject to the action whose pendency was so noted. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

The date to which the lien relates back and fixes the priority of the claim, with respect to real property, is the time at which the notice of the order of attachment is docketed in the record of lis pendens in the county where the property is located. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

CASE NOTES

Section 1-440.43 provides a method by which interested third parties attack an attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Section 1-440.43 applies to any person who has acquired a lien upon or an interest in attached property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.37. Modification of the order of attachment.

CASE NOTES

Section 1-440.43 provides a method by which interested third parties may attack an attachment. Such section applies to any person who has acquired a lien upon or an interest in such property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.43. Remedies of third person claiming attached property or interest therein.

CASE NOTES

This section provides a method by which interested third parties may attack an attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

ARTICLE 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

CASE NOTES

Stated in Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983).

§ 1-480. Property concealed in buildings.

CASE NOTES

Although this section permits forcible entry, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to § 1-313(4). Red House Furn. Co. v. Smith, 63 N.C. 769, 313 S.E.2d 569 (1984).

An officer cannot break open an outer door or window of a dwelling against the

consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, 63 N.C. 769, 313 S.E.2d 569 (1984).

Applied in Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-502.1. Applicant for receiver to furnish bond to adverse party.

Before a judge may appoint a receiver, the judge shall require the party making application for the appointment to furnish a bond payable to the adverse party in a form and amount approved by the judge. The bond shall secure payment by the applicant of all damages, including reasonable attorney fees, sustained by the adverse party by the appointment and acts of the receiver if the appointment is vacated or otherwise set aside. The judge may require that the amount of bond be increased for this purpose any time after the appointment of a receiver. (1983 (Reg. Sess., 1984), c. 994, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 994, s. 2, makes this section effective October 1, 1984, and applicable to applications for a receiver made on or after that date.

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.

CASE NOTES

Selection of Counsel by Receiver. — When a receiver is directed by the court appointing him to employ counsel to assist him in the discharge of his duties, it is the receiver's duty to select an independent counsel rather than one who is acting for either party in the action. Where there is a perfect identity of interests between the plaintiffs and the receivers or where the parties have consented, the exception may arise, permitting a party's counsel to serve as counsel to the receiver. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

§ 1-507.9. Compensation and expenses; counsel fees.

CASE NOTES

Counsel Fees Where Employment Unlawful Because of Conflict of Interest. — Where the employment of an attorney by a receiver is unlawful by reason of his employment by an adverse party, he should not for that reason be denied a reasonable compensation for services which were necessary or valuable to the receiver, when performed with the usual fidelity and ability. Charges properly excluded would be for services rendered in a manner influenced by the attorney's professional connection with the adverse party. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

Review of Compensation of Persons Employed to Assist Receiver. — Those

employed by a receiver to assist in the administration of a receivership should understand that their compensation is subject to trial court review and approval. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

The allowance of commissions, etc. — In accord with 1st paragraph in original. See Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 41.

Quo Warranto.

§ 1-515. Action by Attorney General.

CASE NOTES

Defendant's testimony concerning hearings held by a county board of elections was not hearsay, as defendant testified only as to what he had done, and he did not testify as to the results of the inquiry to the board of elections. Such evidence was relevant to the issue before the jury, that is, whether defendant has usurped, intruded into, or unlawfully held his public office. State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

§ 1-527. Judgment in such actions.

CASE NOTES

Applied in State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

ARTICLE 42.

Waste.

§ 1-536. Action by tenant against cotenant.

CASE NOTES

Stated in Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983).

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.

CASE NOTES

Application of Section. — In order for this statute to apply, the defendant must be a trespasser to the land and must injure, cut or remove wood, timber, shrubs, or trees thereon

or therefrom. Matthews v. Brown, 62 N.C. App. 559, 303 S.E.2d 223 (1983).

Applied in Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983); Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

ARTICLE 43D.

Abolition of Parent-Child Immunity in Motor Vehicle Cases.

§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases.

Legal Periodicals. —

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

It is not this section standing alone which abrogates parental immunity in wrongful death actions arising out of operation of motor vehicles; it is this section and § 28A-18-2, read in pari materia, which bring about this result. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Wrongful Death Action by Child's Estate. — Where parental immunity would not have barred a personal injury action brought by a deceased child had he lived, it likewise does not bar a wrongful death action brought by his estate. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

As this section has abolished the doctrine of parental immunity in personal injury and property damage cases arising out of a parent's operation of a motor vehicle, the doctrine is no longer a bar to wrongful death actions by the deceased child's estate which likewise arises out of a parent's operation of a motor vehicle. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

A wrongful death action based on defendant mother's negligence in operation of a motor vehicle could be maintained on behalf of deceased child's estate against defendant mother, but only the father would be entitled to share in any recovery. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Father would not be barred from sharing in any recovery by his son's estate where the estate's recovery would be grounded, if at all, solely on the negligence of the child's mother. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Cited in Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

CASE NOTES

I. IN GENERAL.

Stated in State Distrib. Corp. v. G.E. Bobbitt & Assocs., 62 N.C. App. 530, 303 S.E.2d 349 (1983).

ARTICLE 45A.

Arbitration and Award.

§ 1-567.1. Short title.

CASE NOTES

Legislative Intent. — The legislative intent underlying the Uniform Arbitration Act, favors arbitration as a means of dispute resolution. Nevertheless, the right to arbitration is contractual, and, thus, in accordance with traditional contract principles, may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Strict Confidentiality Not Required. — Nothing in the North Carolina statutes governing arbitration requires strict confidentiality. Industrotech Constructors, Inc. v. Duke Univ., — N.C. App. —, 314 S.E.2d 272 (1984).

While some jurisdictions vest sole authority in the arbitrator to determine the issue of waiver, the North Carolina Court of Appeal believes the arbitrator is the proper person only when the issue of waiver is intertwined with the substance of the parties dispute. When, in contrast, the issue of waiver is predicated upon participation in a lawsuit by a party seeking arbitration, the court believes it to be more practical and efficient for the trial judge to determine the waiver issue. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

There are four situations in which a defendant may be deemed to have waived a contractual right to arbitration: (1) When parties pursue an action in court with neither party seeking to invoke a previously agreed upon arbitration clause, the trial judge may render a judgment on the merits, since the parties, by their conducts have impliedly waived their rights to arbitration; (2) when a civil action concerning alimony, child support, and custody is already filed and pending and there has been no prior agreement to arbitrate, the trial judge is without authority, even if the parties consent, to order arbitration; (3) when defendant did not demand arbitration within the applicable statutory time limit, defendant is barred from asserting his right to arbitration, and (4) when the defendant participates in litigation or takes other action inconsistent with the right to arbitration, so that plaintiff will be prejudiced if the court action is stayed and arbitration ordered, then the trial judge may find a waiver of arbitration rights. When determining, in the fourth situation, whether defendants' actions have prejudiced plaintiff, the question is one of reasonableness. Therefore, it is the duty of the trial judge to consider the situations of the parties, the nature of the transaction, and the facts of the particular case. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Applied in Rustad v. Rustad, — N.C. App. —, 314 S.E.2d 275 (1984).

§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.

CASE NOTES

Stated in Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

§ 1-567.3. Proceedings to compel or stay arbitration.

CASE NOTES

This section provides means for a party to seek court determination of whether an agreement to arbitrate exists. Blow v. Shaughnessy, — N.C. App. —, 313 S.E.2d 868 (1984).

Effect of Section. — This section provides the means by which a party on notice of intent to arbitrate may object to or seek to stay a demand for arbitration on the grounds that there is no agreement to arbitrate. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Court's inquiry under this section not limited to question of whether agreement to arbitrate exists. Blow v. Shaughnessy, — N.C. App. —, 313 S.E.2d 868 (1984).

Upon proof of arbitration agreement the court may still determine preliminary questions of res judicata and the preliminary question of waiver. Cyclone Roofing Co. v. David M. LaFave Co., — N.C. App. —, 312 S.E.2d 709 (1984).

Stated in Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984); Bluffs, Inc. v. Wysocki, — N.C. App. —, 314 S.E.2d 291 (1984).

§ 1-567.10. Change of award by arbitrators.

CASE NOTES

Errors of law or fact are insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Since the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

§ 1-567.12. Confirmation of an award.

CASE NOTES

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

In as much as the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

§ 1-567.13. Vacating an award.

CASE NOTES

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Attacks on Regularity, etc. —
In accord with 1st paragraph in original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The discovery of new evidence is not grounds for vacating or refusing to enforce the arbitrator's award. Wilks v. American Bakeries Co., 563 F. Supp. 560 (W.D.N.C. 1983).

§ 1-567.14. Modification or correction of award.

CASE NOTES

Errors of Law or Fact, etc. —
In accord with original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

When Fairness or Regularity, etc. —
In accord with original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

§ 1-567.18. Appeals.

CASE NOTES

Stated in Bluffs, Inc. v. Wysocki, — N.C. App. —, 314 S.E.2d 291 (1984).

§ 1-567.20. Uniformity of interpretation.

CASE NOTES

Applied in Bluffs, Inc. v. Wysocki, — N.C. App. —, 314 S.E.2d 291 (1984).

Chapter 1A.

Rules of Civil Procedure.

Sec.

1A-1. Rules of Civil Procedure.

Article 7.

Judgment.

Rule

62. Stay of proceedings to enforce a judgment.

§ 1A-1. Rules of Civil Procedure.

Legal Periodicals. — For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

CASE NOTES

Applicability of Rules. — The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to the provisions of §§ 128-16 through 128-20. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Rule 2. One form of action.

CASE NOTES

I. IN GENERAL.

Application of Section. — The argument that the general rule establishing one form of action requires that a lien be enforced by commencing an action under this rule, overlooks the familiar rule of construction that a particular statute controls a general one with reference to the same subject matter. For example, section 44A-13(a) specifically directs that a lien against property vested in a trustee in bankruptcy shall be enforced in accordance with the orders of the bankruptcy court. Therefore, section 44A-13(a) controls over this rule. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

I. IN GENERAL.

Due process requires that a party be properly notified of the proceeding against him. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Cited in Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218 (1983); Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984); Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

II. COMMENCEMENT BY ISSUANCE OF SUMMONS.

In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Effect of Fatally Defective Summons. — Where an action is filed in one county and summons issues directing defendant to appear and answer in another county, the summons is fatally defective. A fatally defective summons is incapable of conferring jurisdiction. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Rule 4. Process.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Due process requires that a party be properly notified of the proceeding against him. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

The purpose of service, etc. —
A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, it has fulfilled its purpose. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

Compliance with Statutory Requirements, etc. —
In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Five Day Time Limit, etc. —
Where a complaint has been filed and proper summons does not issue within the five days allowed under this rule, the action is deemed never to have commenced. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Applied in In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380 (1983); House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983); DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Cited in Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

The purpose of section (d) of this rule is only to keep the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served. Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218 (1983).

The service of process requirements of section (j) of this rule are mandatory. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

Where an action is filed in one county and summons demands appearance in another county, such summons is fatally defective. A fatally defective summons is incapable of conferring jurisdiction. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

IV. SERVICE ON CORPORATIONS.

To Whom Process May Be Delivered, etc. —

When the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent is adequate to bring the corporate defendant within the trial court's jurisdiction. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

VI. AMENDMENT OF SUMMONS.

An amended summons which adds a new party-defendant must be served upon each of the defendants. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

Rule 6. Time.

CASE NOTES

I. IN GENERAL.

The 30-day provision in Rule 41(d) should not be read in conjunction with section 6(b) of this rule. Sanford v. Starlite Disco, Inc., — N.C. App. —, 311 S.E.2d 67 (1984).

Applied in Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190 (1983).

Stated in Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579 (1983).

Cited in G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983); Elmore v. Elmore, — N.C. App. —, 313 S.E.2d 904 (1984).

V. ADDITIONAL TIME AFTER SERVICE BY MAIL.

Section (e) does not apply to appeals from an Employment Security Commission adjudicator, so as to give the appealing party, in addition to the 10-day period prescribed by § 96-15(b)(2), three additional days within which to file an appeal. Smith v. Daniels Int'l, 64 N.C. App. 381, 307 S.E.2d 434 (1983).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Towery v. Anthony, — N.C. App. —, 314 S.E.2d 570 (1984).

Stated in Chappell v. Redding, — N.C. App. —, 313 S.E.2d 239 (1984).

Cited in Beard v. Pembaur, — N.C. App. —, 313 S.E.2d 853 (1984).

Rule 8. General rules of pleadings.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Phillips v. Grand Union Co., 64 N.C. App. 373, 307 S.E.2d 205 (1983); Hendrix v. Hendrix, — N.C. App. —, 313 S.E.2d 25 (1984); Norlin Indus., Inc. v. Music Arts, Inc., — N.C. App. —, 313 S.E.2d 166 (1984); Carter v. Carr, — N.C. App. —, 314 S.E.2d 281 (1984); Towery v. Anthony, — N.C. App. —, 314 S.E.2d 570 (1984).

Stated in Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983); Chappell v. Redding, — N.C. App. —, 313 S.E.2d 239 (1984).

Cited in Beard v. Pembaur, — N.C. App. —, 313 S.E.2d 853 (1984).

II. PLEADINGS, GENERALLY.

Sufficiency of Pleading, etc. —
A party is not required to plead evidence. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

Purpose of Subsection (a)(2). —
In accord with original. See Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

Use of the Rule 41(b) power of dismissal as a sanction for violation of Rule 8(a)(2) provision as to pleading of malpractice damages. Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983).

A motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure, and should not be granted so long as the pleading meets the requirements of 1A-1, Rule 8 and/or Rule 9 and fairly notifies the opposing party of the nature of the claim. Fisher v. Lamm, — N.C. App. —, 311 S.E.2d 61 (1984).

III. AFFIRMATIVE DEFENSES.

Failure to plead an affirmative defense ordinarily results in waiver thereof. The parties may, however, still try the issue by express or implied consent. Nationwide Mut. Ins. Co. v. Edwards, — N.C. App. —, 312 S.E.2d 656 (1984).

Defenses Raised in Hearing, etc. —
In accord with original. See C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., — N.C. App. —, 310 S.E.2d 615 (1984).

Payment is an affirmative defense and as such it must be pleaded by the party asserting it. The general rule is that the burden of showing payment must be assumed by the party interposing it. Shaw v. Shaw, 63 N.C. App. 775, 306 S.E.2d 506 (1983).

Rule 9. Pleading special matters.

CASE NOTES

VIII. Pleading and Practice.

I. IN GENERAL.

The pleading with particularity required by section (b) of this rule is complemented by 1A-1, Rule 15(b). Benfield v. Costner, — N.C. App. —, 313 S.E.2d 203 (1984).

Applied in Plemmons v. City of Gastonia, 62 N.C. App. 470, 302 S.E.2d 905 (1983); Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983); Bishop v. Reinhold, — N.C. App. —, 311 S.E.2d 298 (1984).

Cited in African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983).

III. FRAUD, DURESS, MISTAKE, ETC.

Actual fraud and constructive fraud satisfy the particularity requirement in varying ways. Benfield v. Costner, — N.C. App. —, 313 S.E.2d 203 (1984).

The very nature of constructive fraud defies specific and concise allegations. This particularity requirement may be met by alleging facts and circumstances (1) which created the

relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Benfield v. Costner, — N.C. App. —, 313 S.E.2d 203 (1984).

VIII. PLEADING AND PRACTICE.

A motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure, and should not be granted so long as the pleading meets the requirements of 1A-1, Rule 8 and/or Rule 9 and fairly notifies the opposing party of the nature of the claim. Fisher v. Lamm, — N.C. App. —, 311 S.E.2d 61 (1984).

Where the opposing party does not object to evidence outside the issues raised by the pleadings, the issue is tried with his implied consent. Benfield v. Costner, — N.C. App. —, 313 S.E.2d 203 (1984).

Rule 11. Signing and verification of pleadings.

CASE NOTES

I. IN GENERAL.

Applied in Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983).

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleading.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in North Carolina ex rel. Horne v. Chafin, 309 N.C. 813, 309 S.E.2d 239 (1983); Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888 (1983); Monte Enters., Inc. v. Kavanaugh, 62 N.C. App. 541, 303 S.E.2d 194 (1983); Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983); Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983); Pearce v. American Defender Life Ins. Co., 62 N.C. App. 661, 303 S.E.2d 608 (1983); Snuggs v. Stanly County Dep't of Pub. Health, 63 N.C. App. 86, 303 S.E.2d 646 (1983); Phillips v. Grand Union Co., 64 N.C. App. 373, 307 S.E.2d 205 (1983); G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983); Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983); Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983); Martin Marietta Corp. v. Forsyth County Zoning Bd. of Adjustment, 658 N.C. App. 316, 309 S.E.2d 523 (1983); Snuggs v. Stanly County Dep't of Pub. Health, — N.C. —, 314 S.E.2d 528 (1984); Presbyterian Hosp. v. McCartha, — N.C. App. —, 310 S.E.2d 409 (1984); Oates v. Jag, Inc., — N.C. App. —, 311 S.E.2d 369 (1984); Payne v. North Carolina Farm Bureau Mut. Ins. Co., — N.C. App. —, 313 S.E.2d 912 (1984); DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984); Bradbury v. Cummings, — N.C. App. —, 314 S.E.2d 568 (1984).

Stated in Towery v. Anthony, — N.C. App. —, 314 S.E.2d 570 (1984).

Cited in Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 305 S.E.2d 528 (1983); Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584 (1983); Consolidated Systems v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984); Renwick v. News & Observer Publishing Co., — N.C. —, 312 S.E.2d 405 (1984); Fisher v. Lamm, — N.C. App. —, 311 S.E.2d 61 (1984); Freeman v. SCM Corp., — N.C. App. —, 311 S.E.2d 75 (1984); Adams v.

Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984); Black v. Littlejohn, — N.C. App. —, 312 S.E.2d 909 (1984); Moretz v. Northwestern Bank, — N.C. App. —, 313 S.E.2d 8 (1984); Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984); Brown v. Averette, — N.C. App. —, 313 S.E.2d 865 (1984); Stanback v. Westchester Fire Ins. Co., — N.C. App. —, 314 S.E.2d 775 (1984); Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984); Howard v. Ocean Trail Convalescent Center, — N.C. App. —, 315 S.E.2d 97 (1984).

V. PERSONAL JURISDICTION.

A general appearance will waive the right to challenge personal jurisdiction only when it is made prior to the proper filing of a section (b)(2) motion contesting jurisdiction over the person. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Right to Challenge, etc. —

Where defendant's initial action was the filing of a motion which, inter alia, sought dismissal pursuant to section (b)(2) of this rule for lack of jurisdiction over his person, a subsequent general appearance would not have waived his right to challenge personal jurisdiction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

IX. FAILURE TO STATE CLAIM.

A. In General.

Motion to dismiss is the usual, etc. —

The motion to dismiss under section (b)(6) of this rule tests the sufficiency of the complaint to state a claim for relief. Hendrix v. Hendrix, — N.C. App. —, 313 S.E.2d 25 (1984).

A Rule 12(b)(6) motion tests the legal sufficiency of the claim. The rules regarding the sufficiency of a complaint to withstand such a motion are equally applicable to a claim for relief presented in a counterclaim by the defendant. A counterclaim is sufficient to withstand the motion where no insurmountable bar to recovery on the claim appears on its face. Thus, the question becomes whether the counterclaim states a claim upon which relief can be granted on any theory. Chrysler Credit Corp. v. Rebhan, — N.C. App. —, 311 S.E.2d 606 (1984).

Dismissal Is Precluded, etc. —

A complaint is deemed sufficient to withstand a motion to dismiss under this rule where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983).

And a complaint should not be dismissed unless, etc. —

In accord with 2nd paragraph in original. See Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983).

A motion to dismiss pursuant to section (b)(6) of this rule is properly granted when the complaint affirmatively discloses to a certainty that even if the facts alleged therein were true, the plaintiff would be entitled to no relief. Plemmons v. City of Gastonia, — N.C. App. —, 302 S.E.2d 905, cert. denied, 309 N.C. 322, 307 S.E.2d 165, 166 (1983).

Or Where Complaint Discloses, etc. —

In accord with original. See Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983).

The only times when dismissal is proper, etc. —

In accord with 1st paragraph in original. See Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983).

An order denying a motion under subsection (b)(6), etc. —

No appeal lies as a matter of right from the denial of a subsection (b)(6) motion. Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983).

Appeal of Dismissal. — When an action is dismissed with leave to amend, the proceeding is still pending and the plaintiff has no right to appeal such a dismissal interlocutory in nature. When the court allows amendment by the plaintiffs, relief in the trial court has not been entirely denied and appeal is premature. Day v. Coffey, — N.C. App. —, 315 S.E.2d 96 (1984).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

Notice required in situations where subsection (b)(6) motion is treated as a motion for summary judgment is procedural rather than constitutional. As such, the proper action for counsel to take is to request a continuance or additional time to produce evidence. Objections to timeliness are therefore not germane in such situations and the trial court has discretion, provided the opposing party has a "reasonable opportunity" to present pertinent material, to take and consider affidavits in support of a converted Rule 12(b)(6) motion. By participating in the hearing and failing to request a continuance or additional time to produce evidence, a party waives his right to this procedural notice. Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579, cert. denied, 309 N.C. 462, 307 S.E.2d 366 (1983).

XII. MOTION FOR MORE DEFINITE STATEMENT.

Motion for a more definite, etc. —

In accord with original. See Fisher v. Lamm, — N.C. App. —, 311 S.E.2d 611 (1984).

XIII. MOTION TO STRIKE.

No appeal lies as a matter of right from the denial of a motion under section (d). Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983).

Rule 13. Counterclaim and crossclaim.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983); Cyclone Roofing Co. v. David M. LaFave Co., — N.C. App. —, 312 S.E.2d 709 (1984).

Cited in Moretz v. Northwestern Bank, — N.C. App. —, 313 S.E.2d 8 (1984).

II. COUNTERCLAIMS.

Plaintiff insurer's recovery against defendant for intentional damage to property could not be offset by defendant's claim for child support owed to her by the insured, where defendant's counterclaim for child support was a compulsory counterclaim in an earlier action. North Carolina Farm Bureau Mut. Ins. Co. v. Balfour, 62 N.C. App. 580, 302 S.E.2d 922 (1983).

Rule 14. Third-party practice.

Legal Periodicals. —
For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

Applied in Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983).

Rule 15. Amended and supplemental pleadings.

Legal Periodicals. —
For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

I. IN GENERAL.

The pleading with particularity required by 1A-1, Rule 9(b) is complemented by section (b) of this rule. Benfield v. Costner, — N.C. App. —, 313 S.E.2d 203 (1984).

This rule contemplates liberality, etc. — The Rules of Civil Procedure permit a liberal use of amendments to a party's theory of recovery. Taylor v. Gillespie, — N.C. App. —, 311 S.E.2d 362 (1984).

And amendments should always, etc. — This rule allows issues to be raised by liberal amendments to pleadings, and, in some cases, by the evidence, the effect of the rule being to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in

presenting his case. Taylor v. Gillespie, — N.C. App. —, 311 S.E.2d 362 (1984).

Consent Presumed Absent Objection, etc. —

Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

Where defendant did not object to the introduction of certain evidence the pleadings were amended by implication. Formal permission of the court was not required, although the better practice is that the party benefitted should move to amend the pleadings to reflect the theory of recovery. By failing to make timely objection to the introduction of the evidence at variance with the pleadings, defendant waived his right to assert such ground on appeal. Taylor v. Gillespie, — N.C. App. —, 311 S.E.2d 362 (1984).

Where the opposing party does not object to evidence outside the issues raised by the pleadings, the issue is tried with his implied consent. Benfield v. Costner, — N.C. App. —, 313 S.E.2d 203 (1984).

A formal amendment is needed only when evidence is objected to at trial as not within the scope of the pleadings. Taylor v. Gillespie, — N.C. App. —, 311 S.E.2d 362 (1984).

Under certain circumstances a pleading may be deemed amended by implication when evidence outside the scope of the pleading has been received without objection, which evidence constitutes a substantial feature of a case; in such situation no formal amendment of the pleading is required. Hord v. Atkinson, — N.C. App. —, 315 S.E.2d 339 (1984).

Unless Evidence Also Relevant to Support Issue Raised by Pleadings. — Under North Carolina's "notice theory of pleading," a trial proceeds on the issues raised by the pleadings unless the pleadings are amended. If an issue not raised by the pleadings is tried by the "implied consent" of the parties, the pleadings are deemed amended. When, however, the evidence used to support the new issue would also be relevant to support the issue raised by the pleadings, the defendant has not been put on notice of plaintiff's new or alternate theory. Gilbert v. Thomas, 64 N.C. App. 582, 307 S.E.2d 853 (1983).

The trial court has broad discretion, etc.

Rulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture. Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

Use of Allegations Not Denied until Amendment of Answer as Evidential Admissions. — Allegations in a complaint not initially denied by answer, but subsequently denied in an amended answer, may constitute evidential admissions, reflecting something which a party has once said. However, to take advantage of evidential admissions, the opponent must introduce them into evidence. The introduction of "all the admissions of record" does not place this evidence before the jury at trial in the sense of drawing the jury's attention to the specific allegations of the complaint and the specific answers thereto. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

Applied in FMS Mgt. Systems v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983); Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984); Federated Mut. Ins. Co. v. Hardin, — N.C. App. —, 313 S.E.2d 801 (1984); Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 313 S.E.2d 803 (1984).

Cited in Wright v. Commercial Union Ins. Co., 63 N.C. App. 465, 305 S.E.2d 190 (1983); Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Failure to plead an affirmative defense ordinarily results in waiver thereof. However, the parties may still try the issue by express or implied consent. Nationwide Mut. Ins. Co. v. Edwards, — N.C. App. —, 312 S.E.2d 656 (1984).

Rule 16. Pre-trial procedure; formulating issues.

CASE NOTES

Applied in Gilbert v. Thomas, 64 N.C. App. 582, 307 S.E.2d 853 (1983); State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

Cited in Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

Legal Periodicals. —
For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

II. REAL PARTY IN INTEREST.

A real party in interest, etc. —
In accord with original. See Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

And who by substantive law, etc. —
In accord with original. See Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

Absence of the real party in interest did not constitute a "fatal defect" where the opposing party failed to show real prejudice in not having had the real party joined at the original trial. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

In a bank merger, the surviving bank or its transferee has the legal right to enforce a claim because the surviving bank succeeds to the merged bank's holder status by operation of law. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. IN GENERAL.

Who Are Necessary Parties. —
In accord with 4th paragraph in original. See Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983).

Court Should Correct Defect, etc. —
When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. Any such defect should be corrected by the trial court ex mero motu in the absence of a proper motion by a competent person. White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

Absence of the real party in interest did not constitute a "fatal defect" where the opposing party failed to show real prejudice in not having had the real party joined at the original trial. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

Rule 24. Intervention.

CASE NOTES

I. IN GENERAL.

An intervenor is as much a party to the action as the original parties are and has rights equally as broad. Leonard E. Warner, Inc. v. Nissan Motor Corp., in U.S.A., — N.C. App. —, 311 S.E.2d 1 (1984).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

CASE NOTES

I. IN GENERAL.

Subsection (d) of this section is merely a procedural rule; substantive law governs its application. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

Stated in Elmore v. Elmore, — N.C. App. —, 313 S.E.2d 904 (1984).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

CASE NOTES

I. IN GENERAL.

Applied in Industrotech Constructors, Inc. v. Duke Univ., — N.C. App. —, 314 S.E.2d 272 (1984).

Cited in In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

II. SCOPE OF DISCOVERY GENERALLY.

Orders regarding matters of discovery, etc. —

In accord with original. See Ritter v. Kimball, — N.C. App. —, 313 S.E.2d 1 (1984).

V. PROTECTIVE ORDERS.

The trial judge's order, etc. —

The trial judge does not have unlimited authority to issue a protective order. An order under section (c) of this rule is, however, discretionary, and is reviewable only for abuse of discretion. Williams v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 312 S.E.2d 905 (1984); Ritter v. Kimball, — N.C. App. —, 313 S.E.2d 1 (1984).

Rule 30. Depositions upon oral examination.

CASE NOTES

I. IN GENERAL.

Applied in Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190 (1983).

Rule 32. Use of depositions in court proceedings.

CASE NOTES

Applied in Holbrooks v. Duke Univ., Inc., 63 N.C. App. 504, 305 S.E.2d 69 (1983); In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. IN GENERAL.

The purpose of this rule is to prevent litigants from engaging in mere fishing expeditions to discover evidence or using the rule for harassment purposes. Williams v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 312 S.E.2d 905 (1984).

As to what constituted, etc. —

When a party requests production of documents under this rule, he must show good cause, which includes the elements of necessity and relevance. Williams v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 312 S.E.2d 905 (1984).

Rule 35. Physical and mental examination of persons.

CASE NOTES

Stated in Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

Rule 36. Requests for admission; effect of admission.

CASE NOTES

It is no longer necessary, etc. —

In accord with original. See Southland Assocs. Realtors v. Miner, 62 N.C. App. 126, 308 S.E.2d 773 (1983).

Where a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

A trial judge may allow withdrawal of an admission. Whitley v. Coltrane, 65 N.C. App. 679, 309 S.E.2d 712 (1983).

Facts admitted by one defendant are not binding on a codefendant. Barclays Am. Fin., Inc. v. Haywood, 65 N.C. App. 387, 308 S.E.2d 921 (1983).

Rule 37. Failure to make discovery; sanctions.

CASE NOTES

Default as Sanction for Failure, etc. —

In accord with original. See Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

Where a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

Sanction Overturned Only, etc. —

The choice of sanctions under this rule lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. Routh v. Weaver, — N.C. App. —, 313 S.E.2d 793 (1984).

Applied in FMS Mgt. Systems v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

CASE NOTES

Applied in Roberson v. Roberson, 65 N.C. App. 404, 309 S.E.2d 520 (1983).

Rule 40. Assignment of cases for trial; continuances.

CASE NOTES

I. IN GENERAL.

Stated in Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

Rule 41. Dismissal of actions.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Function of the trial judge as trier of the facts is to evaluate the evidence without any limitation as to inferences favorable to plaintiff. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

Applied in Hilton v. Howington, 63 N.C. App. 717, 306 S.E.2d 196 (1983); Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983); Martin Marietta Corp. v. Forsyth County Zoning Bd. of Adjustment, 65 N.C. App. 570, 309 S.E.2d 523 (1983).

Cited in Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983); Copy Prods., Inc. v. Randolph, 62 N.C. App. 553, 303 S.E.2d 87 (1983); Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983); Norman v. Royal Crown Bottling Co., 64 N.C. App. 200, 306 S.E.2d 828 (1983); Jones v. Allred, 64 N.C. App. 462, 307 S.E.2d 578 (1983); Butler Serv. Co. v. Butler Serv. Group, Inc., — N.C. App. —, 310 S.E.2d 406 (1984); Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984); Jackson v. Jackson, — N.C. App. —, 315 S.E.2d 90 (1984); Howard v. Ocean Trail Convalescent Center, — N.C. App. —, 315 S.E.2d 97 (1984).

II. VOLUNTARY DISMISSAL.

No Court Action Required. — Subdivision (a)(1) of this rule clearly does not require court action, other than ministerial record-keeping functions, to effect a dismissal. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Plaintiff's voluntary dismissal of a prior action is a final termination, etc. —
Where plaintiff takes a voluntary dismissal pursuant to subsection (a)(1) of this rule, no suit is pending thereafter on which the court can make a final order. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

III. INVOLUNTARY DISMISSAL.

A. In General.

Involuntary Dismissal May Be Used to Sanction Disobedient Parties. — The power to sanction disobedient parties, even to the point of dismissing their actions or striking their defenses, did not originate with this rule. It is long-standing and inherent. For courts to function properly, it could not be otherwise. Minor v. Minor, 62 N.C. App. 750, 303 S.E.2d 397 (1983).

Use of power of dismissal as sanction for violation of Rule 8(a)(2) provision as to pleading of malpractice damages. See Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983).

Surplusage in Order. — It was the trial court's duty, when presented with plaintiff's motion for an involuntary dismissal of defendant's request for attorneys' fees, to examine the quality of defendant's evidence and make a ruling on the merits; this the trial court did, denying defendant's motion. The additional language in the order indicating that the motion for appellate attorneys' fees was dismissed without prejudice was without legal effect and would be regarded as mere surplusage. Whedon v. Whedon, — N.C. App. —, 314 S.E.2d 794 (1984).

Dismissal at Close of Evidence. — Section (b) of this rule does not specifically provide for involuntary dismissal at the close of all the evidence. However, where such a motion is made and ruled upon and the court has made findings as required by Rule 52, the judgment entered will be treated as a judgment on the merits. African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 649 (1984).

C. Failure to Show Right to Relief.

Court May Determine Facts, etc. —

In accord with 2nd paragraph in original. See Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

Section (b) of this rule permits the trial judge to weigh the evidence, to find facts against the movant, and to sustain respondents' motion at the conclusion of the movant's evidence. In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475, cert. denied, 309 N.C. 820, 310 S.E.2d 358 (1983).

Despite Plaintiff's Prima Facie Case. —

In accord with original. See Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

At the close of the movant's evidence, the judge may grant judgment against the movant on the basis of facts as he determines them to be. This is true even where the movant has made out a prima facie case which would withstand a motion for directed verdict for the respondent in a jury trial. In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475, cert. denied, 309 N.C. 820, 310 S.E.2d 358 (1983).

But Court Is Not Compelled, etc. —

Under section (b) of this rule, the judge is not required to rule on the motion at the close of the plaintiff's evidence and may decline to render any judgment until the close of all the evidence. African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, — N.C. App. —, 308 S.E.2d 73 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 649 (1984).

No Provision Made for Section (b), etc. —

Section (b) of this rule provides for a motion for dismissal at the close of plaintiff's evidence; it does not provide for such motion at the close of all the evidence. Menzel v. Metrolina Anesthesia Assocs., — N.C. App. —, 310 S.E.2d 400 (1984).

There is little point in a motion for dismissal at the close of all the evidence, since at that stage the judge will determine the facts in any event. Menzel v. Metrolina Anesthesia Assocs., — N.C. App. —, 310 S.E.2d 400 (1984).

Findings and Conclusions, etc. —

If the court grants a motion under section (b) of this rule, the rule requires the judge to make findings of fact in accordance with Rule 52(a). Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purpose of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts. In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

Conclusive Effect on Appeal, etc. —

Where the trial judge's findings are supported by the evidence and those findings in turn support his conclusions of law, they are binding on appeal. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

The findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, arguendo, there is evidence to the contrary. The trial court's judgment therefore must be granted the same deference as a jury verdict. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

IV. COSTS.

The object of this statutory rule is clearly to provide superior and district courts with authority for the efficient collection of costs in cases in which voluntary dismissals are taken; therefore, the filing of notice of dismissal, while it may terminate adversary proceedings in the case, does not terminate the court's authority to enter orders apportioning and taxing costs. Ward v. Taylor, — N.C. App. — 314 S.E.2d 814 (1984).

The language of section (d) constitutes a mandatory directive, etc. —

In accord with original. See Sanford v. Starlite Disco, Inc., — N.C. App. —, 311 S.E.2d 67 (1984).

The 30-day provision in section (d) should not be read in conjunction with Rule 6(b) which provides for an enlargement of the time within which to take a given action, and that the court erred in not considering plaintiff's alleged excusable neglect as an explanation for his late payment of the costs. Sanford v. Starlite Disco, Inc., — N.C. App. —, 311 S.E.2d 67 (1984).

Correction of order. — The trial court's failure to allow and tax costs could be considered an oversight or omission in its order, and since the substantive rights of the parties were not affected thereby, the court had authority under Rule 60(a) to correct such inadvertent omission. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Authority of Superior Court Clerk. — Although a voluntary dismissal is not per se a final judgment, the clerk of superior court has authority to tax costs against a plaintiff who takes a dismissal; in fact, the clerk is ordinarily the proper official to tax such costs. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Rule 42. Consolidation; separate trials.

CASE NOTES

III. SEPARATE TRIALS.

The trial judge has discretion to sever issues for trial in order to further convenience or avoid prejudice. On remand, if the trial judge exercises such discretion, it is recommended that he enter findings and conclusions that will establish the appropriateness of severance. Vance Trucking Co. v. Phillips, — N.C. App. —, 311 S.E.2d 318 (1984).

Rule 43. Evidence.

CASE NOTES

IV. RECORD OF EXCLUDED EVIDENCE.

The trial judge should be loath to deny an attorney his right to have an excluded answer placed in the record, because the appellate division may not concur in his judgment that the proffered testimony is clearly inadmissible. Nix v. Allstate Ins. Co., — N.C. App. —, 314 S.E.2d 562 (1984).

Or Where Evidence Is Clearly, etc. — While section (c) of this rule requires the trial court, upon request, to allow the insertion of excluded evidence in the record, the trial judge is not required to allow insertion of an answer in the record if it clearly appears that the proffered testimony is not admissible on any grounds. Nix v. Allstate Ins. Co., — N.C. App. —, 314 S.E.2d 562 (1984).

Rule 45. Subpoena.

CASE NOTES

Where it was evident that plaintiffs waited until the last minute to serve an extremely broad subpoena, the court properly found that the subpoena was unreasonable and oppressive and did not abuse its discretion in quashing it. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Rule 46. Objections and exceptions.

CASE NOTES

I. IN GENERAL.

Requirement of subsection (a)(1), etc. — In accord with original. See McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983).

Section (b) of this rule only requires, etc. — Where no proper exception was made, but the

transcript shows that the plaintiff informed the court of his opposition to the directed verdict and the grounds for his opposition, the exception was properly preserved pursuant to section (b) of this rule. McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983).

Stated in Skvarla v. Park, 62 N.C. App. 482, 303 S.E.2d 354 (1983).

Rule 49. Verdicts.

CASE NOTES

I. IN GENERAL.

The judge is required, etc. —

The trial judge must submit to the jury all issues which are necessary to settle the material controversies arising out of the pleadings. Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

Applied in Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

I. IN GENERAL.

Applied in Libby Hill Seafood Restaurants, Inc. v. Owens, 62 N.C. App. 695, 303 S.E.2d 565 (1983); Church v. First Union Nat'l Bank, 63 N.C. App. 359, 304 S.E.2d 633 (1983); Oxendine v. Moss, 64 N.C. App. 205, 306 S.E.2d 831 (1983); Jones v. Allred, 64 N.C. App. 462, 307 S.E.2d 578 (1983); Browne v. Macaulay, 65 N.C. App. 708, 309 S.E.2d 704 (1983); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983); Murdock v. Ratliff, — N.C. —, 314 S.E.2d 518 (1984); Wiseman v. Wiseman, — N.C. App. —, 314 S.E.2d 566 (1984); Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

Stated in Sample v. Morgan, — N.C. App. —, 311 S.E.2d 47 (1984).

Cited in Copy Prods., Inc. v. Randolph, 62 N.C. App. 553, 303 S.E.2d 87 (1983); Moore v. Reynolds, 63 N.C. App. 160, 303 S.E.2d 839 (1983); Driftwood Manor Investors v. City Fed. Sav. & Loan Ass'n, 63 N.C. App. 459, 305 S.E.2d 204 (1983); Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983); Cook v. Ponos, 65 N.C. 705, 309 S.E.2d 706 (1983); New Hanover County v. Burton, 65 N.C. App. 544, 310 S.E.2d 72 (1983); Hairston v. Alexander Tank & Equip. Co., — N.C. —, 311 S.E.2d 559 (1984); Mims v. Mims, 65 N.C. App. 725, 310 S.E.2d 130 (1984); Wilder v. Squires, — N.C. App. —, 315 S.E.2d 63 (1984); Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984).

II. DIRECTED VERDICT.

A. In General.

As Considered in the Light, etc. —

In accord with 2nd paragraph in original. See Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983); Douglas v. Parks, — N.C. App. —, 315 S.E.2d 84 (1984).

With Contradictions, Conflicts, etc. —

In determining whether the evidence is sufficient to withstand a motion for directed verdict, plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in plaintiff's favor. Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 62 N.C. App. 419, 303 S.E.2d 332, cert. denied, 309 N.C. 461, 307 S.E.2d 364, 365 (1983).

And Giving Nonmovant, etc. —

In accord with 7th paragraph in original. See Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

Question Presented by Motion for Directed Verdict. —

In accord with 1st paragraph in original. See Hong v. George Goodyear Co., 63 N.C. App. 741, 306 S.E.2d 157 (1983).

A motion for a directed verdict pursuant to section (a) of this rule presents the question of whether the evidence presented is sufficient to carry the case to the jury. In passing on this motion, the trial judge must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the nonmovant. The motion may be granted only if the evidence is insufficient to justify a verdict for the nonmovant as a matter of law. Satterfield v. Pappas, — N.C. App. —, 312 S.E.2d 511 (1984).

Where Question Is Close, Better Practice, etc. —

In accord with 1st paragraph in original. See Tice v. Hall, 63 N.C. App. 27, 303 S.E.2d 832 (1983).

If More Than Scintilla of Evidence Motion Should Be Denied. — The court should deny a motion for directed verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

And If Plaintiff Shows No Right, etc. —

In accord with 2nd paragraph in original. See Mitchell v. Parker, — N.C. App. —, 315 S.E.2d 76 (1984); Willis v. Russell, — N.C. App. —, 315 S.E.2d 91 (1984).

A verdict may never, etc. —

A verdict may not be directed when the facts are in dispute, and the credibility of testimony is for the jury, not the trial judge. Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983).

Sufficiency of evidence is a question, etc. —

Where the plaintiffs fail to make a prima facie showing for relief, they are not entitled to have their case sent to the jury and the trial judge may rule on the issue as a matter of law. Hong v. George Goodyear Co., 63 N.C. App. 741, 306 S.E.2d 157 (1983).

Directed Verdict When Plaintiff's Evidence Shows Contributory Negligence. —

In accord with 5th paragraph in original. See Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plainiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Mitchell v. Parker, — N.C. App. —, 315 S.E.2d 76 (1984).

Raising of Issues on Appeal. — When a specific ground for a directed verdict is not stated in the original motion, it cannot be raised on appeal; even the sufficiency of the evidence cannot be raised for the first time on appeal. Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

If More Than Scintilla of Evidence Motion Should Be Denied. — The court should deny a motion for judgment notwithstanding the verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

Contributory Negligence as Grounds for Judgment N.O.V. — Judgment notwithstanding the verdict on the grounds of contributory negligence should be granted only when the evidence establishes plaintiff's negligence so clearly that no other reasonable inference can be drawn from the evidence. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

Rule 51. Instructions to jury.

CASE NOTES

I. IN GENERAL.

Applied in Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); Sykes v. Floyd, 65 N.C. App. 172, 308 S.E.2d 498 (1983).

Stated in In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983); Adams v. Mills, — N.C. App. —, 314 S.E.2d 589 (1984).

II. CHARGE TO THE JURY, GENERALLY.

Requirement of Former § 1-180, etc. —

Although the provisions of § 1-180 have been repealed and are now embodied in subsection (a) of this rule, the law remains, for all practical purposes, unchanged. Consolidated Systems v.

Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

Not Dependent on Request, etc. —

The trial court has a duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983).

Judge Must Declare, etc. —

This rule imposes upon the trial judge a duty to explain the law and to apply it to the evidence on all substantial features of the case. Federated Mut. Ins. Co. v. Hardin, — N.C. App. —, 313 S.E.2d 801 (1984).

This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. Hord v. Atkinson, — N.C. App. —, 315 S.E.2d 339 (1984).

No Error in Failure to Instruct, etc. —

While it is the general rule that in a civil case the trial judge must declare and explain the law arising in the evidence, even in the absence of a special request such rule has certain accepted limits. Such as the duty is to explain the law and apply it on all substantial features of the case and the instruction must be based on evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. In re Will of Cooley, — N.C. App. —, 311 S.E.2d 613 (1984).

Trial judge did not err in failing to charge on the jury's right to consider the physical evidence, where the plaintiff had failed to submit a proposed instruction and had failed to submit her request to him in writing as required by section (b) of this rule. Hord v. Atkinson, — N.C. App. —, 315 S.E.2d 339 (1984).

V. OPINION OF THE JUDGE.

In Any Manner at Any Stage of Trial. —

Expressions of opinion in the presence of a jury are prohibited, and understandably so, since most juries lack the training needed to consider only relevant and competent evidence without guidance. In contrast, in a trial without a jury, the fact finder is also a highly trained legal expert, and thus the evil addressed by the statute is less likely to exist. Consolidated Systems v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

Rule 52. Findings by the court.

CASE NOTES

I. IN GENERAL.

Applied in Turner v. Turner, 64 N.C. App. 342, 307 S.E.2d 407 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

Cited in Roberts v. Roberts, — N.C. App. —, 314 S.E.2d 781 (1984).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

The trial judge is required, etc. —

Section (a)(1) of this rule does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 65 N.C. App. 242, 310 S.E.2d 33 (1983).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983); Payne v. North Carolina Farm Bureau Mut. Ins. Co., — N.C. App. —, 313 S.E.2d 912 (1984).

Stated in Sanders v. George A. Yancey Trucking Co., 62 N.C. App. 602, 303 S.E.2d 600 (1983); Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983); Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984).

Cited in Porter v. Matthews Enters., Inc., 63 N.C. App. 140, 303 S.E.2d 828 (1983); Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983); Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Denial of Summary Judgment, etc. — Fact that the trial court makes the finding required under section (b) of this rule before a final judgment can be entered, i.e., that there is no just reason for delay of entry of a final judgment, does not make the denial of summary judgment immediately appealable, because it is not a final judgment. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1963).

Rule 55. Default.

CASE NOTES

I. IN GENERAL.

Effect of Appearance of Defendant on Right to Notice. — Defendant's appearance in an action is of no significance in determining whether he is entitled to notice of plaintiff's motion for any entry of default under section (a). It is only in reference to entry of a default judgment, under section (b), that a party's appearance entitles him to notice. G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983).

Applied in Pryse v. Strickland Lumber & Bldg. Supply, Inc., — N.C. App. —, 311 S.E.2d 598 (1984).

III. ENTRY OF JUDGMENT BY DEFAULT.

A. By Clerk.

When Clerk May Enter Judgment. — The clerk can enter a default judgment against a defendant only if the defendant has failed to appear in the matter. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

The entry of default by the clerk requires only that the clerk ascertain that the party against whom a judgment for affirmative relief is sought has failed to plead. Beard v. Pembaur, — N.C. App. —, 313 S.E.2d 853 (1984).

IV. SETTING ASIDE DEFAULT.

Entry of default and judgment by default would be improper where defendants showed (1) excusable neglect in failing to timely file a responsive pleading and (2) a meritorious defense to plaintiff's claim. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

In exercising its discretion, etc. — A motion for entry of default and default judgment is addressed to the discretion of the court. In exercising its discretion the trial court should be guided by the consideration that default judgments are disfavored by the law. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

Rule 56. Summary judgment.

Legal Periodicals. — For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Section (c) does not require that a party move for summary judgment in order to be entitled to it. McNair Constr. Co. v. Fogle Bros. Co., 64 N.C. App. 282, 307 S.E.2d 200 (1983).

Applied in Coats v. Jones, 309 N.C. 815, 309 S.E.2d 253 (1983); Henderson v. Provident Life & Accident Ins. Co., 62 N.C. App. 476, 303 S.E.2d 211 (1983); Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893 (1983); Cleland v. Children's Home, Inc., 64 N.C. App. 153, 306 S.E.2d 587 (1983); Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983); Warren Bros. Co. v. North Carolina Dep't of Transp., 64 N.C. App. 598, 307 S.E.2d 836 (1983); McCullough v. Amoco Oil Co., — N.C. —, 312 S.E.2d 417 (1984); Durham v. Cox, 65 N.C. App. 739, 310 S.E.2d 371 (1984); Carter v. Poole, — N.C. App. —, 310 S.E.2d 617 (1984); Elliott v. Duke Univ., Inc., — N.C. App. —, 311 S.E.2d 632 (1984); Latta v. Farmers County Mut. Fire Ins. Co., — N.C. App. —, 313 S.E.2d 214 (1984); Bennett v. Fuller, — N.C. App —, 313 S.E.2d 597 (1984); DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984); Parks v. Perry, — N.C. App. —, 314 S.E.2d 287 (1984).

Quoted in Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752 (1983).

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983); Asher v. Asher, — N.C. App. —, 311 S.E.2d 700 (1984); Poythress v. Libbey-Owens Ford Co., — N.C. App. —, 313 S.E.2d 893 (1984); Towery v. Anthony, — N.C. App. —, 314 S.E.2d 570 (1984).

Cited in Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579 (1983); North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983); Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); City Nat'l Bank v. Rojas, 64 N.C. App. 347, 307 S.E.2d 387 (1983); Frendlich v. Vaughan's Foods of Henderson, Inc., 64 N.C. App. 332, 307 S.E.2d 412 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); Brown v. North Carolina Wesleyan College, Inc., 65 N.C. App. 579, 309 S.E.2d 701 (1983); New Hanover County v. Burton, 65 N.C. App. 544, 310 S.E.2d 72 (1983); Presbyterian Hosp. v. McCartha, — N.C. App. —, 310 S.E.2d 409 (1984).

II. PURPOSE OF SUMMARY JUDGMENT.

This rule is designed to permit penetration, etc. —

Summary judgment is designed to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

A motion for summary judgment is an attempt by a party to avoid the necessity of trial by exposing a fatal weakness in the claim or defense of his opponent. Normile v. Miller, 63 N.C. App. 689, 306 S.E.2d 147 (1983).

And to Allow a Preview, etc. —

In accord with original. See Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

The purpose of this rule is to eliminate formal trials, etc. —

In accord with 1st paragraph in original. See Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

III. PROPRIETY OF SUMMARY JUDGMENT.

A. In General.

Summary judgment is a drastic remedy. —

In accord with original. See Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 719 (1983); Bradshaw v. McElroy, 62 N.C. App. 515, 302 S.E.2d 908 (1983).

So That No Party Is Deprived, etc. —

In accord with original. See Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983).

A genuine issue is one, etc. —

In accord with original. See Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983).

A genuine issue of material fact is defined as one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not

prevail. A genuine issue is one which can be maintained by substantial evidence. Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

When Issue Is Material. —

In accord with 1st paragraph in original. See Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983).

In accord with 2nd paragraph in original. See Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983).

In application for life insurance policy, written questions and answers relating to health are material as a matter of law. Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983).

B. Particular Types of Actions, etc.

Summary judgment is rarely appropriate in a negligence action. —

Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

And Ordinarily Negligence Actions, etc. —

Negligence issues are not ordinarily susceptible to summary disposition. However, where there is no genuine issue of material fact and reasonable men could only concede the defendant was not negligent, then a motion for summary judgment is proper. Boza v. Schiebel, 65 N.C. App. 151, 308 S.E.2d 510 (1983).

There is a presumption against granting summary judgment in negligence cases. Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 719 (1983).

As it is usually the jury's prerogative, etc. —

The stringent requirements placed on a movant are intended, because summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. McCullough v. AMOCO Oil Co., 64 N.C. App. 312, 307 S.E.2d 208 (1983).

It is an accepted tenet of the jurisprudence that summary judgment is rarely proper in negligence cases. Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard. But where there is no genuine issue of material fact and reasonable men could only conclude that the defendant was not negligent, entry of summary judgment is proper. Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983); Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 S.E. 634, 308 S.E.2d 718, 719 (1983).

Summary judgment may be granted in a negligence action. Cole v. Duke Power Co., — N.C. App. —, 314 S.E.2d 808 (1984).

Summary judgment in a libel action is not favored where proof of actual malice is required of the plaintiff. Cochran v. Piedmont Publishing Co., 62 N.C. App. 548, 302 S.E.2d 903, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

Movant Must Establish Lack, etc. —

A defendant is entitled to summary judgment only when he can produce a forecast of evidence, which when viewed most favorably to plaintiff would, if offered by plaintiff at trial, without more, compel a directed verdict in defendant's favor, or if defendant can show through discovery that plaintiff cannot support his claim. Coats v. Jones, 63 N.C. App. 151, 303 S.E.2d 655, aff'd, 309 N.C. 815, 309 S.E.2d 253 (1983).

The moving party has the burden of establishing that there is no genuine issue as to any material fact, entitling him to judgment as a matter of law. This motion requires the movant and the opponent to produce a forecast of the evidence he will present at trial. Normile v. Miller, 63 N.C. App. 689, 306 S.E.2d 147 (1983).

The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. His papers are meticulously scrutinized and all inferences are resolved against him. Joel T. Cheatham, Inc. v. Hall, 64 N.C. App. 678, 308 S.E.2d 457 (1983).

And Must Show Entitlement, etc. —

In accord with 3rd paragraph in original. See Kaimowitz v. Duke L.J., — N.C. App. —, 315 S.E.2d 82 (1984).

Nonmovant Must Evince Existence of Triable Issue of Material Fact. — The party opposing summary judgment is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must, at the hearing upon motion for summary judgment, be able to evince the existence of a triable issue of material fact. Wachovia Bank & Trust Co. v. Grose, 64 N.C. App. 289, 307 S.E.2d 216 (1983).

Or by Showing that Opponent, etc. —

In accord with original. See Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983).

If the moving party satisfies, etc. —

Once the movant for summary judgment demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial. Orient Point Assocs. v. Plemmons, — N.C. App. —, 315 S.E.2d 366 (1984).

When Nonmovant Must Come Forward, etc. —

In addition to no issue of fact being present, to grant summary judgment a court must find "that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law." Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983).

Hence when motion, etc. —

When the party moving for summary judgment presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. Wachovia Bank & Trust Co. v. Grose, 64 N.C. App. 289, 307 S.E.2d 216 (1983).

V. FUNCTION OF TRIAL COURT.

Court Is Not Authorized, etc. —

In ruling on a motion for summary judgment, the court should not decide issues of fact. However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented. Joel T. Cheatham, Inc. v. Hall, 64 N.C. App. 678, 308 S.E.2d 457 (1983).

But to Determine Whether Genuine, etc. —

Summary judgment does not authorize the court to decide an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists. Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983).

VII. CONSTRUCTION OF EVIDENCE AND INFERENCES.

While Resolving Inconsistencies, etc. —

In determining whether a genuine issue of material fact exists, the court must view all material furnished in support of and in opposition to the motion for summary judgment in the light most favorable to the party opposing the motion. Bradshaw v. McElroy, 62 N.C. App. 515, 302 S.E.2d 908 (1983).

XIII. APPEALS.

Questions on Appeal, etc. —

In accord with original. See Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

Denial of Motion, etc. —

The denial of a motion for summary judgment is not appealable. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

Fact that the trial court makes the finding required under Rule 54(b) before a final judgment can be entered, i.e., that there is no just reason for delay of the entry of a final judgment, does not make the denial of summary judgment immediately appealable, because it is not a final judgment. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

Rule 58. Entry of judgment.

CASE NOTES

Objectives of Rule. —

Since many rights relating to the appeals process are "keyed" to the time of "entry of judgment," it is imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered. State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

There are no cases which have construed § 15A-101(4a), which governs "entry of judgment" in criminal cases. However, this rule is sufficiently analogous to provide guidance in the area. State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

Requirements for Entry of Judgments, etc. —

Although there are situations where it would be more convenient for a judge to mail his ruling to the clerk, and then allow the clerk to notify the respective parties of the judge's decision, the better practice, in criminal cases, is for the judge to announce his rulings in open court and direct the clerk to note the ruling in the minutes of the court. When the judge's ruling is not announced in open court, the order or judgment containing the ruling must be signed and filed with the clerk in the county, in the district and during the session when and where the

question is presented. These rules serve to protect the interests of the defendant, the State, and the public, by allowing all interested persons to be informed as to when a judgment or order has been rendered in a particular matter. State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

Cited in Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984); Day v. Coffey, — N.C. App. —, 315 S.E.2d 96 (1984).

Rule 59. New trials; amendment of judgments.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

And the Court's Decision, etc. —
In accord with 2nd paragraph in original. See Hord v. Atkinson, — N.C. App. —, 315 S.E.2d 339 (1984).

Discretion Where No Question, etc. —
A verdict under this rule will not be disturbed upon appeal, absent a showing of abuse of discretion. However, where the trial court grants this rule motion based on an issue of law, its decision may be fully reviewed on appeal. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 313 S.E.2d 803 (1984).

Applied in Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983); Wachovia Bank & Trust Co. v. Guthrie, — N.C. App. —, 313 S.E.2d 603 (1984).

Cited in African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); Hairston v. Alexander Tank & Equip. Co., — N.C. —, 311 S.E.2d 559 (1984).

Rule 60. Relief from judgment or order.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Braun v. Grundman, 63 N.C. App. 387, 304 S.E.2d 636 (1983); Gardner v. Gardner, 63 N.C. App. 678, 306 S.E.2d 496 (1983); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); Briar Metal Prods., Inc. v. Smith, 64 N.C. App. 173, 306 S.E.2d 553 (1983); State ex rel. Miles v. Mitchell, 64 N.C. App. 202, 306 S.E.2d 857 (1983); Carter v. Carr, — N.C. App. —, 314 S.E.2d 281 (1984).

Stated in State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984).

Cited in North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983); Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983); Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Jackson v. Jackson, — N.C. App. —, 315 S.E.2d 90 (1984).

II. RELIEF UNDER SECTION (A).

The trial court's failure to allow and tax costs could be considered an oversight or omission in the order, and since the substantive rights of the parties were not affected thereby, the court had authority under section (a) of this rule to correct the inadvertent omission of costs from its order. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

III. RELIEF UNDER SECTION (B).

A. In General.

The broad language of section (b)(6) of this section gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. Flinn v. Laughinghouse, — N.C. App. —, 315 S.E.2d 72 (1984).

Divorce Decree Regular on Face of Judgment Roll. — Section (b)(4) of this rule requires that the judgment be void. A divorce decree, in all respects regular on the face of the judgment roll, is at most voidable, not void. Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

Appellate review of a section (b) motion, etc. —

In accord with original. See Hilton v. Howington, 63 N.C. App. 717, 306 S.E.2d 196 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 294 (1984).

The trial judge's extensive power to afford relief from judgments is accompanied by a corresponding discretion to deny it, and the only question for appellate determination is whether the trial court abused its discretion in denying the motion. Sawyer v. Goodman, 63 N.C. App. 191, 303 S.E.2d 632, cert. denied, 309 N.C. 823, 310 S.E.2d 352 (1983).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

Attacking Consent Judgment on Grounds of Mutual Mistake. — When parties seek to attack a consent judgment on the basis of mutual mistake by way of a motion in the cause, section (b)(6) of this rule controls. In re Baity, 65 N.C. App. 364, 309 S.E.2d 515 (1983).

D. Fraud, Misrepresentation and Misconduct of Adverse Party.

Where decedent's nephew was not notified or made a party to adoption nullification proceeding initiated by daughter of decedent's former wife, the nephew was fully empowered to bring an independent action to vacate the clerk's order. Flinn v. Laughinghouse, — N.C. App. —, 315 S.E.2d 72 (1984).

Rule 61. Harmless error.

CASE NOTES

Applied in Barber v. Dixon, 62 N.C. App. 455, 302 S.E.2d 915 (1983); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983).

Cited in Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

Rule 62. Stay of proceedings to enforce a judgment.

(b) *Stay on motion for new trial or for judgment.* — In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(1967, c. 954, s. 1; 1973, c. 91; 1979, c. 820, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (b) of this section is set out to correct an error in the Replacement Volume.

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

CASE NOTES

I. IN GENERAL.

Applied in Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

Cited in Shishko v. Whitley, 64 N.C. App. 668, 308 S.E.2d 448 (1983).

II. PRELIMINARY INJUNCTIONS.

Purpose of Preliminary, etc. —
In accord with 1st paragraph in original. See A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

A preliminary injunction is interlocutory in nature, issued after notice and hearing, and restrains a party pending final determination on the merits. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Grounds for Preliminary Injunction. —
A preliminary injunction will be issued only if plaintiff is able to show likelihood of success on the merits of his case and if plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of plaintiff's rights during the course of litigation. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Decision of the trial judge, etc. —
Issuance of a preliminary injunction is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Scope of Appeal. — On appeal from an order of superior court granting or denying a preliminary injunction, the appellate court is not bound by the findings of the trial court, but may review and weigh the evidence and find facts for itself. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

IV. SECURITY.

The purpose of the security requirement in section (c) is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief. Similarly, it has been suggested that the purpose of the bond is to require that the plaintiff assume the risk of paying damages he causes as the "price" he must pay to have the extraordinary privilege of a temporary restraining order or preliminary injunction. Leonard E. Warner, Inc. v. Nissan Motor Corp., in U.S.A., — N.C. App. —, 311 S.E.2d 1 (1984).

Rule 68. Offer of judgment and disclaimer.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

Rule 70. Judgment for specific acts; vesting title.

CASE NOTES

Where damages are alleged because of noncompliance with a consent judgment, a Rule 70 motion is inappropriate. Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983).

Chapter 1C.

Enforcement of Judgments.

Article 16.

Exempt Property.

Sec.
1C-1601. What property exempt; waiver; exceptions.

Article 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

(a) Exempt property. — Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of his creditors:

(1) The debtor's aggregate interest, not to exceed seven thousand five hundred dollars ($7,500) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's aggregate interest in any property, not to exceed two thousand five hundred dollars ($2,500) in value less any amount of the exemption used under subdivision (1).

(3) The debtor's interest, not to exceed one thousand dollars ($1,000) in value, in one motor vehicle.

(4) The debtor's aggregate interest, not to exceed two thousand five hundred dollars ($2,500) in value for the debtor plus five hundred dollars ($500) for each dependent of the debtor, not to exceed two thousand dollars ($2,000) total for dependents, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed five hundred dollars ($500) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(6) Life insurance as provided in Article X, Section 5 of the Constitution of North Carolina.

(7) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(8) Compensation for personal injury or compensation for the death of a person upon whom the debtor was dependent for support, but such compensation is not exempt from claims for funeral, legal, medical, dental, hospital, and health care charges related to the accident or injury giving rise to the compensation.

(1981, c. 490, s. 1; 1981 (Reg. Sess., 1982), c. 1224, ss. 1-7, 20.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (a) of this section is set out to correct an error in subdivision (a)(3) in the Replacement Volume.

CASE NOTES

Legislative Intent. — There is no clear indication in §§ 1C-1601 through 1C-1604 that the General Assembly intended to repeal any statutes other than §§ 1-369 through 1-392. Therefore, to find that §§ 1C-1601 through 1C-1604 precludes the exemption granted by § 135-9 would be to determine that § 135-9 has been repealed by implication. Repeal by implication is not favored in North Carolina. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

The purpose of the exemption under subdivision (a)(1) of this section, is to permit the debtor some flexibility in determining which of his assets should be sheltered from creditors' claims. There is no reason to treat motor vehicles differently from other forms of property in according protection to this legislative goal. Avco Fin. Servs. v. Isbell, — N.C. App. —, 312 S.E.2d 707 (1984).

The language of subdivision (a)(2) of this section is clear and free from ambiguity. Avco Fin. Servs. v. Isbell, — N.C. App. —, 312 S.E.2d 707 (1984).

Under subdivision (a)(2) then, a debtor, may use the exemption to shelter any property except that described in the residence exemption, whether it be motor vehicles, other personal property, tools of the trade, or property not qualifying for any other exemption. Avco Fin. Servs. v. Isbell, — N.C. App. —, 312 S.E.2d 707 (1984).

The limits contained in subdivision (a)(3) of this section apply only to exemptions claimed under that subsection and have no application to exemptions claimed under subdivision (a)(2) of this section. Avco Fin. Servs. v. Isbell, — N.C. App. —, 312 S.E.2d 707 (1984).

Purpose of Subsection (d). — The obvious purpose of subsection (d) of this section is to prevent pre-petition planning whereby a debtor uses nonexempt property to purchase exempt personal property, or purchases exempt personal property with the proceeds of a dischargeable loan obligation. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

Term "purchase" does not encompass every means of acquiring property, and should be defined in the context of subsection (d) of this section so as not to include an acquisition of exemptable property by exchange of life, exemptable personal property where there is no new interest in property obtained, but merely a transfer of equity from the property given to the property received. This definition allows the statute to accomplish its purpose of denying debtors the benefit of certain prebankruptcy petition planning, but will not unnecessarily hinder an honest debtor who trades certain property which could be claimed as exempt for other property of like kind a short time before seeking a fresh start. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

This section expresses interest in ensuring that a bankruptcy debtor retain sufficient possessions for a fresh start. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by §§ 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Subsection (c) of this section does not preclude the use of § 135-9 by a bankruptcy debtor to claim an exemption in state employee retirement benefits. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 1C-1602. Alternative exemptions.

CASE NOTES

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by §§ 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 1C-1603. Procedure for setting aside exempt property.

CASE NOTES

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by §§ 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 1C-1604. Effect of exemption.

CASE NOTES

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

Chapter 4.

Common Law.

§ 4-1. Common law declared to be in force.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Robinson v. King, — N.C. App. —, 314 S.E.2d 768 (1984).

II. ILLUSTRATIVE CASES.

B. Criminal.

Obstruction of justice is a common-law offense in North Carolina. Article 30 of Chapter 14 does not abrogate this offense. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

§ 5A-11. Criminal contempt.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in Faught v. Faught, — N.C. App. —, 312 S.E.2d 504 (1984).

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

CASE NOTES

Stated in Faught v. Faught, — N.C. App. —, 312 S.E.2d 504 (1984).

§ 5A-17. Appeals.

CASE NOTES

Cited in State v. McGee, — N.C. App. —, 311 S.E.2d 383 (1984).

Article 2.

Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

CASE NOTES

I. GENERAL CONSIDERATION.

Thus, Defendant Must Possess Means, etc. —

In order to imprison a defendant found in civil contempt, the trial judge must find that the defendant has the present ability to comply or to take reasonable measures to enable him to comply with the order. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

A trial court's findings that a defendant was healthy and able-bodied, had been and was presently employed, had not been in ill health or incapacitated, and had the ability to earn good wages, without finding that defendant presently had the means to comply, do not sup-

port confinement in jail for contempt. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

Appointment of Counsel. — When a civil proceeding may result in imprisonment, due process requirements are met by evaluating the necessity for appointed counsel on a case-by-case basis. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

Stated in Abernethy v. Abernethy, 64 N.C. App. 386, 307 S.E.2d 396 (1983).

Cited in Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Imprisonment for Nonsupport. — A defendant in a nonsupport civil contempt proceeding can be imprisoned only if he has willfully violated the court order and has the present ability to make the payments. He can regain his liberty by doing that which the court has ordered him to do and he has the ability to do; i.e., make the payments. This is consistent with the notion that civil contempt is not criminal punishment, but a civil remedy to be utilized exclusively to enforce compliance with court orders. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

Failure to Pay Child Support Where Unable to Do So. — A defendant who has not made child support payments because he is actually unable to make the payments does not face a loss of liberty. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

Chapter 6.

Liability for Court Costs.

Article 3.

Civil Actions and Proceedings.

Sec.

6-21.5. Attorney's fees in nonjusticiable cases.

Article 1.

Generally.

§ 6-7. Clerk to enter costs in case file.

CASE NOTES

Cited in Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Article 3.

Civil Actions and Proceedings.

§ 6-20. Costs allowed or not, in discretion of court.

CASE NOTES

Cited in Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

§ 6-21. Costs allowed either party or apportioned in discretion of court.

CASE NOTES

II. COSTS IN PARTICULAR ACTIONS.

A. Caveats to Wills.

No Authority to Award Fees Which Were Postponed Pending Retrial after Judgment Erroneously Set Aside. — Where the court's refusal to award attorney's fees was based on its decision to postpone any award until the matter was retried, and the court erred when it set aside the judgment and ordered a new trial, and since the appellate court directed that the consent judgment be reinstated, the trial court was without authority to order the payment of attorney's fees as a part of the costs of the caveat proceedings. In re Baity, 65 N.C. App. 364, 309 S.E.2d 515 (1983).

§ 6-21.5. Attorney's fees in nonjusticiable cases.

In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section. (1983 (Reg. Sess., 1984), c. 1039, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1039, s. 2, makes this section effective October 1, 1984, and applicable to actions begun on and after that date.

Article 5.

Liability of Counties in Criminal Actions.

§ 6-40. Liability of counties, where trial removed from one county to another.

CASE NOTES

Stated in In re Dunlap, — N.C. App. —, 310 S.E.2d 415 (1984).

Chapter 7A.

Judicial Department.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 3.

The Supreme Court.

Sec.

7A-10. (Effective until July 1, 1985) Organization; compensation of justices.
7A-10. (Effective July 1, 1985) Organization; compensation of justices.

Article 4.

Court of Appeals.

7A-18. (Effective until July 1, 1985) Compensation of judges.
7A-18. (Effective July 1, 1985) Compensation of judges.

Article 5.

Jurisdiction.

7A-29. (For effective date see note) Appeals of right from certain administrative agencies.

Article 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 7.

Organization.

7A-41. Superior court divisions and districts; judges; assistant district attorneys.
7A-44. (Effective until July 1, 1985) Salary and expenses of superior court judge.
7A-44. (Effective July 1, 1985) Salary and expenses of superior court judge.

Article 8.

Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.

Sec.

7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.

Article 9.

District Attorneys and Judicial Districts.

7A-65. (Effective until July 1, 1985) Compensation and allowances of district attorneys and assistant district attorneys.
7A-65. (Effective July 1, 1985) Compensation and allowances of district attorneys and assistant district attorneys.

Article 12.

Clerk of Superior Court.

7A-101. Compensation.
7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.
7A-113. Bookkeeping and accounting systems equipment.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 13.

Creation and Organization of the District Court Division.

7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Article 14.

District Judges.

7A-144. (Effective until July 1, 1985) Compensation.

Sec.
7A-144. (Effective July 1, 1985) Compensation.
7A-146. Administrative authority and duties of chief district judge.

Article 16.

Magistrates.

7A-171.1. Duty hours, salary, and travel expenses within county.
7A-177. Training course in duties of magistrate.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

7A-304. Costs in criminal actions.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

7A-341. (Effective July 1, 1985) Appointment and compensation of Director.
7A-342. (Effective July 1, 1985) Appointment and compensation of assistant director and other employees.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

7A-455. Partial indigency; liens; acquittals.

Article 37.

The Public Defender.

7A-465. Public defender; defender districts; qualifications; compensation.
7A-467. (Effective until July 1, 1985) Assistant defenders; assigned counsel.
7A-467. (Effective July 1, 1985) Assistant defenders; assigned counsel.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

Article 54.

Juvenile Records and Social Reports.

7A-677. Effect of expunction.
7A-678. Notice of expunction.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 3.

The Supreme Court.

§ 7A-10. (Effective until July 1, 1985) Organization; compensation of justices.

(a) The Supreme Court shall consist of a Chief Justice and six associate justices, elected by the qualified voters of the State for terms of eight years. Before entering upon the duties of his office, each justice shall take an oath of office. Four justices shall constitute a quorum for the transaction of the business of the court. Sessions of the court shall be held in the city of Raleigh, and scheduled by rule of court so as to discharge expeditiously the court's business.

(b) The Chief Justice and each of the associate justices shall receive the annual salary provided in the budget appropriations act. Each justice is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(c) In lieu of merit and other increment raises paid to regular State employees, the Chief Justice and each of the Associate Justices shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service.

§ 7A-10 is set out twice. See section heading for effective dates.

"Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (1967, c. 108, s. 1; 1983, c. 761, s. 242; 1983 (Reg. Sess., 1984), c. 1109, ss. 11, 13.1.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 7A-10.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "and" following "five years of service," in the first sentence of subsection (c), added the language beginning "fourteen and four-tenths percent" at the end of that sentence and rewrote the last sentence of subsection (c), which read "Service shall mean service as justice or judge of the General Court of Justice."

§ 7A-10. (Effective July 1, 1985) Organization; compensation of justices.

(a) The Supreme Court shall consist of a Chief Justice and six associate justices, elected by the qualified voters of the State for terms of eight years. Before entering upon the duties of his office, each justice shall take an oath of office. Four justices shall constitute a quorum for the transaction of the business of the court. Sessions of the court shall be held in the city of Raleigh, and scheduled by rule of court so as to discharge expeditiously the court's business.

(b) The Chief Justice and each of the associate justices shall receive the annual salary provided in Current Operations Appropriations Act. Each justice is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(c) In lieu of merit and other increment raises paid to regular State employees, the Chief Justice and each of the Associate Justices shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (1967, c. 108, s. 1; 1983, c. 761, s. 242; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 7A-10.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1109, ss. 11 and 13.1, effective July 1, 1984, deleted "and" following "five years of service" in the first sentence of subsection (c), added the language beginning "fourteen and four-tenths percent" at the end of that sentence and rewrote the last sentence of subsection (c), which read "Service shall mean service as justice or judge of the General Court of Justice."

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 165, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in subsections (b) and (c) of this section.

ARTICLE 4.

Court of Appeals.

§ 7A-18. (Effective until July 1, 1985) Compensation of judges.

(a) The Chief Judge and each associate judge of the Court of Appeals shall

§ 7A-10 is set out twice. See section heading for effective dates.

§ 7A-18 is set out twice. See section heading for effective dates.

receive the annual salary provided in the budget appropriations act. Each judge is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the Court of Appeals shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (1967, c. 108, s. 1; 1983, c. 761, s. 243; 1983 (Reg. Sess., 1984), c. 1109, ss. 11, 13.1.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 7A-18.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "and" following "five years of service" near the middle of the first sentence of subsection (b), added the language beginning "fourteen and four-tenths percent" at the end of that sentence and rewrote the second sentence of subsection (b), which read "Service shall mean service as a justice or judge of the General Court of Justice."

§ 7A-18. (Effective July 1, 1985) Compensation of judges.

(a) The Chief Judge and each associate judge of the Court of Appeals shall receive the annual salary provided in the Current Operations Appropriations Act. Each judge is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the Court of Appeals shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (1967, c. 108, s. 1; 1983, c. 761, s. 243; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 7A-18.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1109, ss. 11 and 13.1, effective July 1, 1984, deleted "and" following "five years of service" near the middle of the first sentence of subsection (b), added the language beginning "fourteen and four-tenths percent" at the end of that sentence and rewrote the second sentence of subsection (b), which read "Service shall mean service as a justice or judge of the General Court of Justice."

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 165, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

§ 7A-18 is set out twice. See section heading for effective dates.

ARTICLE 5.

Jurisdiction.

§ 7A-27. Appeals of right from the courts of the trial divisions.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983); State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983); State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983).

Cited in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); American Nat'l Ins. Co. v. Ingram, 63 N.C. App. 38, 303 S.E.2d 649 (1983); State v. Rothwell, 308 N.C. 782, 303 S.E.2d 798 (1983); Porter v. Matthews Enters., Inc., 63 N.C. App. 140, 303 S.E.2d 828 (1983); Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983); State v. Forney, 310 N.C. 126, 310 S.E.2d 20 (1984); Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984); Duke Univ. v. Bryant-Durham Elec. Co., — N.C. App. —, 311 S.E.2d 638 (1984); Wallace Butts Ins. Agency, Inc. v. Runge, — N.C. App. —, 314 S.E.2d 293 (1984).

IV. INTERLOCUTORY ORDERS.

A. Generally.

When Interlocutory Order Appealable, etc. —

An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment. Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

For a defendant to have a right of appeal from a mandatory preliminary injunction, substantial rights of the appellant must be adversely affected. Otherwise, an appeal from such an interlocutory order is subject to being dismissed. Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

Avoidance of a rehearing or trial, etc. —

Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment, and the avoidance of a trial is not a "substantial right" that would make such an interlocutory order appealable under § 1-277 or subsection (d) of this section. Howard v. Ocean Trail Convalescent Center, — N.C. App. —, 315 S.E.2d 97 (1984).

The effect of both § 1-277, etc. —

In accord with 1st paragraph in original. See State v. Jones, — N.C. App. —, 313 S.E.2d 264 (1984).

The reason for the rules embodied in § 1-277(a) and subdivision (d)(1) of this section is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. McKinney v. Royal Globe Ins. Co., 64 N.C. App. 370, 307 S.E.2d 390 (1983).

B. Particular Orders.

There is no immediate right of appeal from an order compelling arbitration. Bluffs, Inc. v. Wysocki, — N.C. App. —, 314 S.E.2d 291 (1984).

§ 7A-29. (For effective date see note) Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b), the Department of Human Resources pursuant to G.S. 131E-188(b), the Commissioner of Banks pursuant to Articles 17 and 18 of Chapter 53 of the General Statutes, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Prop-

§ 7A-29 is set out twice. See section heading for effective dates.

erty Tax Commission pursuant to G.S. 105-290 and 105-342, the Board of State Contract Appeals pursuant to G.S. 143-135.9, or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4 or from the Governor pursuant to the Waste Management Act of 1981, G.S. 130-166.17B and G.S. 104E-6.2, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1113, s. 2.)

Section Set Out Twice. — The section above is effective until the amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 2, becomes effective. For this section as amended by c. 1087, s. 2, see the following section, also numbered § 7A-29, and the notes thereunder.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1000, s. 4, provides that the act shall become effective October 1, 1984, but shall not affect any appeal for which notice of appeal was filed prior to the effective date of the act.

Session Laws 1983 (Reg. Sess., 1984), c. 1113, s. 3, provides:

"The question of the extent of authority beyond that conferred by Article 17 [of Chapter 53] upon the Commissioner of Banks with regard to the acquisition of a North Carolina bank or bank holding company by an out-of-State regional bank holding company is referred to the Committee on Taxation and Regulation of Banks, Savings and Loan Associations, and Credit Unions of the Legislative Research Commission for study and report to the 1985 Session of the General Assembly."

Section 130-166.17B, referred to in subsection (a) of this section, was repealed by Session Laws 1983, c. 891, s. 1. As to solid waste management, see now § 130A-290 et seq.

The reference to § 143-135.9, also in subsection (a), appears to be in error. For provisions regarding the Board of State Contract Appeals, see § 143-135.10 et seq.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1000, s. 2, effective Oct. 1, 1984, inserted "the Department of Human Resources pursuant to G.S. 131E-188(b)" in subsection (a).

The 1983 (Reg. Sess., 1984) amendment by c. 1113, s. 2, effective July 7, 1984, inserted "the Commissioner of Banks pursuant to Articles 17 and 18 of Chapter 53 of the General Statutes" in subsection (a).

Legal Periodicals. —

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

§ 7A-29. (For effective date see note) Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b), the Department of Human Resources pursuant to G.S. 131E-188(b), the Commissioner of Banks pursuant to Articles 17 and 18 of Chapter 53 of the General Statutes, the Administrator of Savings and Loans pursuant to Article 3A of Chapter 54B of the General Statutes, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-290 and 105-342, the Board of State Contract Appeals pursuant to G.S. 143-135.9, or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4 or from the Governor pursuant to the Waste Management Act of 1981, G.S. 130-166.17B and G.S. 104E-6.2, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1087, s. 2; c. 1113, s. 2.)

§ 7A-29 is set out twice. See section heading for effective dates.

Section Set Out Twice. — The section above is effective when the amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 2, becomes effective. For this section as in effect until that time, see the preceding section, also numbered § 7A-29. For the effective date of c. 1087, s. 2, see the note below.

Effective Date of Amendment by c. 1087, s. 2. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes ss. 1 through 5 effective of the act on the earlier of: (1) The date on which registration becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1000, s. 4, provides that the act shall become effective October 1, 1984, but shall not affect any appeal for which notice of appeal was filed prior to the effective date of the act.

Session Laws 1983 (Reg. Sess., 1984), c. 1113, s. 3, provides:

"The question of the extent of authority beyond that conferred by Article 17 [of Chapter 53] upon the Commissioner of Banks with regard to the acquisition of a North Carolina bank or bank holding company by an out-of-State regional bank holding company is referred to the Committee on Taxation and Regulation of Banks, Savings and Loan Associations, and Credit Unions of the Legislative Research Commission for study and report to the 1985 Session of the General Assembly."

Section 130-166.17B, referred to in subsection (a) of this section, was repealed by Session Laws 1983, c. 891, s. 1. As to solid waste management, see now § 130A-290 et seq.

The reference to § 143-135.9, also referred to in subsection (a), appears to be in error. For provisions regarding the Board of State Contract Appeals, see § 143-135.10 et seq.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1000, s. 2, effective Oct. 1, 1984, inserted "the Department of Human Resources pursuant to G.S. 131E-188(b)" in subsection (a).

The 1983 (Reg. Sess., 1984) amendment by c. 1087, s. 2, inserted "the Administrator of Savings and Loans pursuant to Article 3A of Chapter 54B of the General Statutes" in subsection (a). For the effective date of this amendment, see the note above.

The 1983 (Reg. Sess., 1984) amendment by c. 1113, s. 2, effective July 7, 1984, inserted "the Commissioner of Banks pursuant to Articles 17 and 18 of Chapter 53 of the General Statutes" in subsection (a).

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

CASE NOTES

Applied in Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983); State v. Green, 309 N.C. 623, 308 S.E.2d 326 (1983); State v. Massey, 309 N.C. 625, 308 S.E.2d 332 (1983); State v. Callicutt, 309 N.C. 626, 308 S.E.2d 333 (1983); Nash v. Conrad Indus., Inc., 309 N.C. 629, 308 S.E.2d 334 (1983); Huyck Corp. v. C.C. Mangum, Inc., 309 N.C. 788, 309 S.E.2d 183 (1983); North Carolina ex rel. Horne v. Chafin, 309 N.C. 813, 309 S.E.2d 239 (1983); Coats v. Jones, 309 N.C. 815, 309 S.E.2d 253 (1983); State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Cited in State v. Wilhite, 308 N.C. 798, 303 S.E.2d 788 (1983).

§ 7A-31. Discretionary review by the Supreme Court.

CASE NOTES

Applied in Pugh v. Davenport, 309 N.C. 628, 308 S.E.2d 292 (1983); Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983); State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983); Barrington v. Employment Sec. Comm'n, 62 N.C. App. 602, 309 S.E.2d 539 (1983).

Cited in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

§ 7A-29 is set out twice. See section heading for effective dates.

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

CASE NOTES

Cited in Industrotech Constructors, Inc. v. Duke Univ., — N.C. App. —, 314 S.E.2d 272 (1984).

§ 7A-34. Rules of practice and procedure in trial courts.

CASE NOTES

Cited in Butler Serv. Co. v. Butler Serv. Group, Inc., — N.C. App. —, 310 S.E.2d 406 (1984).

Article 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

§ 7A-39.1. Justice, emergency justice, judge and emergency judge defined.

Cited in Gentry v. Uniform Judicial Retirement Sys., 378 F. Supp. 1 (M.D.N.C. 1974).

§ 7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.

(a) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served for a total of 15 years, whether consecutive or not, on the Supreme Court, the Court of Appeals, or the superior court, or as Administrative Officer of the Courts, or in any combination of these offices, may retire from his present office and receive for life compensation equal to two thirds of the total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses, from time to time received by the occupant or occupants of the office from which he retired.

(b) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served as justice or judge, or both, in the Appellate Division for 12 consecutive years may retire and receive for life compensation equal to two thirds of the total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses, from time to time received by the occupant or occupants of the office from which he retired.

(c) Any justice or judge of the Appellate Division, who has served for a total of 24 years, whether continuously or not, as justice of the Supreme Court, judge of the Court of Appeals, judge of the superior court, or Administrative Officer of the Courts, or in any combination of these offices, may retire, regardless of age, and receive for life compensation equal to two thirds of the total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses, from time to time received by the occupant or occupants of the office from which he retired. In determining eligibility for retirement under this subsection, time served as a district solicitor of the superior court prior to January 1, 1971, may be included, provided the person has served at least eight years as a justice, judge, or Administrative Officer of the Courts, or in any combination of these offices.

(d) For purposes of this section, the "occupant or occupants of the office from which" the retired judge retired will be deemed to be a judge or justice of the Appellate Division holding the same office and with the same service as the retired judge had immediately prior to retirement. (1967, c. 108, s. 1; 1971, c. 508, s. 2; 1983 (Reg. Sess., 1984), c. 1109, ss. 13.6-13.9.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses" for "annual salary" near the end of subsection (a), in subsection (b) and near the end of the first sentence of subsection (c), and added subsection (d).

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-41. Superior court divisions and districts; judges; assistant district attorneys.

The counties of the State are organized into four judicial divisions and 34 judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant district attorneys set forth in the following table:

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2	5
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	4
	3	Carteret, Craven, Pamlico, Pitt	2	8

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
	4	Duplin, Jones, Onslow, Sampson	2	8
	5	New Hanover, Pender	2	7
	6	Bertie, Halifax, Hertford, Northampton	1	4
	7	Edgecombe, Nash, Wilson	2	7
	8	Greene, Lenoir, Wayne	2	8
Second	9	Franklin, Granville, Person, Vance, Warren	2	5
	10	Wake	4	15
	11	Harnett, Johnston, Lee	1	5
	12	Cumberland, Hoke	3	12
	13	Bladen, Brunswick, Columbus	1	5
	14	Durham	3	8
	15A	Alamance	1	3
	15B	Orange, Chatham	1	3
	16	Robeson, Scotland	1	7
Third	17A	Caswell, Rockingham	1	3
	17B	Stokes, Surry	1	3
	18	Guilford	4	14
	19A	Cabarrus, Rowan	2	5
	19B	Montgomery, Randolph	1	3
	20	Anson, Moore, Richmond, Stanly, Union	2	7
	21	Forsyth	3	9
	22	Alexander, Davidson, Davie, Iredell	2	6
	23	Alleghany, Ashe, Wilkes, Yadkin	1	3
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	2
	25	Burke, Caldwell, Catawba	2	7
	26	Mecklenburg	5	19
	27A	Gaston	2	5
	27B	Cleveland, Lincoln	1	3
	28	Buncombe	2	5
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1	5
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	2	4

In a district having more than one regular resident judge, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge. If two judges are of equal seniority, the oldest judge is the senior regular resident judge. In a single-judge district, the single judge is the senior regular resident judge.

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2; 1983 (Reg. Sess., 1984), c. 1109, ss. 4, 4.1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 13, provides:

"The superior and district court judgeships created by sections 4 and 5 of this act shall be filled as follows:

"(1) Initial appointments to each of the superior court judgeships shall be made by the Governor for a term to expire on December 31, 1986.

"(2) Initial appointments to each of the district court judgeships shall be made by the Governor for a term to expire on the first Monday in December 1986."

Session Laws 1983, (Reg. Sess., 1984), c. 1034, s. 210, which specifies the annual salaries in fiscal year 1984-85 of specified judicial branch officials, provides in part that if an acting senior regular resident superior court judge is appointed under the provisions of G.S. 7A-41, he shall receive the salary for Judge, Senior Regular Resident Superior Court, and the judge he replaces shall receive the salary indicated for Judge, Superior Court.

Effect of Amendments. —

Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 4, effective December 1, 1984, increased the number of Resident Judges in Judicial Districts 1, 9, 18 and 30.

Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 4.1, effective July 1, 1984, increased the number of Full-Time Assistant District Attorneys in Judicial Districts 2, 12, 17B and 18.

§ 7A-44. (Effective until July 1, 1985) Salary and expenses of superior court judge.

(a) A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be paid the same travel allowance as State employees generally by G.S. 138-6(a)(1) and (2), provided that no travel allowance be paid for travel within his county of residence. In addition, a judge of the superior court shall be allowed six thousand five hundred dollars ($6,500) per year, payable monthly, in lieu of necessary subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education.

§ 7A-44 is set out twice. See section heading for effective dates.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the superior court, regular or special, shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36; 1973, c. 1474; 1975, 2nd Sess., c. 983, s. 13; 1977, c. 802, s. 41.1; 1979, 2nd Sess., c. 1137, s. 28; 1981, c. 964, s. 18; 1983, c. 761, s. 244; 1983 (Reg. Sess., 1984), c. 1109, ss. 2.2, 11, 13.1.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 7A-44.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "six thousand five hundred dollars ($6,500)" for "five thousand five hundred dollars ($5,500)" in the second sentence of subsection (a), deleted "and" following "five years of service" in the first sentence of subsection (b) and added the language beginning "fourteen and four-tenths percent" at the end of that sentence, and rewrote the second sentence of subsection (b), which read "Service shall mean service as a justice or judge of the General Court of Justice."

§ 7A-44. (Effective July 1, 1985) Salary and expenses of superior court judge.

(a) A judge of the superior court, regular or special, shall receive the annual salary set forth in the Current Operations Appropriations Act, and in addition shall be paid the same travel allowance as State employees generally by G.S. 138-6(a)(1) and (2), provided that no travel allowance be paid for travel within his county of residence. In addition, a judge of the superior court shall be allowed six thousand five hundred dollars ($6,500) per year, payable monthly, in lieu of necessary subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the superior court, regular or special, shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36; 1973, c. 1474; 1975, 2nd Sess., c. 983, s. 13; 1977, c. 802, s. 41.1; 1979, 2nd Sess., c. 1137, s.

§ 7A-44 is set out twice. See section heading for effective dates.

28; 1981, c. 964, s. 18; 1983, c. 761, s. 244; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 2.2, 11, 13.1.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 7A-44.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1109, ss. 2.2, 11, and 13.1, effective July 1, 1984, substituted "six thousand five hundred dollars ($6,500)" for "five thousand five hundred dollars ($5,500)" in the second sentence of subsection (a), deleted "and" following "five years of service" in the first sentence of subsection (b) and added the language beginning "fourteen and four-tenths percent" at the end of that sentence, and rewrote the second sentence of subsection (b), which read "Service shall mean service as a justice or judge of the General Court of Justice."

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 165, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

§ 7A-49.3. Calendar for criminal trial sessions.

CASE NOTES

Stated in State v. Moore, 65 N.C. App. 56, 308 S.E.2d 723 (1983).

ARTICLE 8.

Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.

§ 7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.

(a) Any judge of the superior court, or Administrative Officer of the Courts, who has attained the age of sixty-five years, and who has served for a total of fifteen years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire and receive for life compensation equal to two thirds of the total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances, from time to time received by the occupant of the office from which he retired.

(b) Any judge of the superior court, or Administrative Officer of the Courts, who has served for twelve years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined may, at age sixty-eight, retire and receive for life compensation equal to two thirds of the total annual compensation, including longevity and additional payment for

§ 7A-44 is set out twice. See section heading for effective dates.

service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances, from time to time received by the occupant of the office from which he retired.

(c) Any person who has served for a total of twenty-four years, whether continuously or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire, regardless of age, and receive for life compensation equal to two thirds of the total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances, from time to time received by the occupant of the office from which he retired. In determining whether a person meets the requirements of this subsection, time served as district attorney of the superior court prior to January 1, 1971, may be included, so long as the person has served at least eight years as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and Administrative Officer of the Courts combined.

(d) Repealed by Session Laws 1971, c. 508, s. 3.

(e) For purposes of this section, the "occupant or occupants of the office from which" the retired judge retired will be deemed to be a superior court judge holding the same office and with the same service as the retired judge had immediately prior to retirement. (1967, c. 108, s. 2; 1971, c. 508, s. 3; 1973, c. 47, s. 2; 1983 (Reg. Sess., 1984), c. 1109, ss. 13.10-13.13.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances" for "annual salary" near the end of subsections (a) and (b), and near the end of the first sentence of subsection (c), and added subsection (e).

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-61. Duties of district attorney.

CASE NOTES

Cited in State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983).

§ 7A-65. (Effective until July 1, 1985) Compensation and allowances of district attorneys and assistant district attorneys.

(a) The annual salary of district attorneys and full-time assistant district attorneys shall be as provided in the Budget Appropriations Act. When traveling on official business, each district attorney and assistant district attorney is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally.

(b) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal

§ 7A-65 is set out twice. See section heading for effective dates.

to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service. Service shall mean service in the elective position of a district attorney and shall not include service as an assistant deputy or acting district attorney.

(c) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of a district attorney and shall not include service as an assistant, deputy, or acting district attorney.

(d) In lieu of merit and other increment raises paid to regular State employees, an assistant district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as an assistant district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1983, c. 761, ss. 246, 248; 1983 (Reg. Sess., 1984), c. 1034, s. 92; c. 1109, s. 13.1.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 7A-65.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 92, effective July 1, 1984, added subsection (d).

The 1983 (Reg. Sess., 1984) amendment by c. 1109, s. 13.1, effective July 1, 1984, deleted "and" following "five years of service," in the first sentence of subsection (c) and added the language beginning "fourteen and four-tenths percent" at the end of that sentence.

§ 7A-65. (Effective July 1, 1985) Compensation and allowances of district attorneys and assistant district attorneys.

(a) The annual salary of district attorneys and full-time assistant district attorneys shall be as provided in the Current Operations Appropriations Act. When traveling on official business, each district attorney and assistant district attorney is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally.

(b) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service. Service shall mean service in the elective position of a district attorney and shall not include service as an assistant deputy or acting district attorney.

(c) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of a district attorney and shall not include service as an assistant, deputy, or acting district attorney.

§ 7A-65 is set out twice. See section heading for effective dates.

(d) In lieu of merit and other increment raises paid to regular State employees, an assistant district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as an assistant district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1983, c. 761, ss. 246, 248; 1983 (Reg. Sess., 1984), c. 1034, ss. 92, 165; c. 1109, s. 13.1.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 7A-65.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 92, effective July 1, 1984, added subsection (d).

The 1983 (Reg. Sess., 1984) amendment by c. 1109, s. 13.1, effective July 1, 1984, deleted "and" following "five years of service," in the first sentence of subsection (c) and added the language beginning "fourteen and four-tenths percent" at the end of that sentence.

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 165, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act.

Article 11.

Special Regulations.

§ 7A-95. Reporting of trials.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 7, effective December 1, 1984, establishes four new positions of court reporter, to be appointed in accordance with the provisions of subsection (e) of this section.

Article 12.

Clerk of Superior Court.

§ 7A-101. Compensation.

The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the population projections of the Office of State Budget and Management for the year preceding the first year of each biennial budget, according to the following schedule:

Population	*Salary*
Less than 49,999	$30,000
50,000 to 99,999	34,500
100,000 to 199,999	39,000
200,000 and above	44,500

When a county changes from one population group to another, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first year of each biennial budget, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

§ 7A-65 is set out twice. See section heading for effective dates.

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service. Service shall mean service in the elective position of clerk of superior court and shall not include service as an assistant, deputy, or acting clerk.

In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of clerk of superior court and shall not include service as an assistant, deputy, or acting clerk. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1034, effective July 1, 1984, substituted "population projections of the Office of State Budget and Management for the year preceding the first year of each biennial budget" for "1970 federal decennial census" in the first paragraph, rewrote the schedule of salaries at the end of the first paragraph, and in the second paragraph deleted "as a result of any future decennial census" following "changes from one population group to another" and substituted "year of each biennial budget" for "full biennium subsequent to the taking of the census (July 1, 1981; July 1, 1991; etc.)."

The 1983 (Reg. Sess., 1984) amendment by c. 1109, effective July 1, 1984, deleted "and" following "five years of service," in the first sentence of the last paragraph and added the language beginning "fourteen and four-tenths percent" at the end of that sentence.

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in his office to serve at his pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be. The job classifications and related salaries of each employee within the office of each superior court clerk shall be subject to the approval of the Administrative Officer of the Courts after consultation with each clerk concerned and shall be subject to the availability of funds appropriated for that purpose by the General Assembly.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to

the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. A full-time assistant clerk or a full-time deputy clerk shall be paid an annual salary subject to the following minimum and maximum rates:

Assistant Clerks	
Minimum	$15,132
Maximum	$25,980
Deputy Clerks	
Minimum	$11,664
Maximum	$19,716

Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an entry-level annual salary of not more than three-fourths of the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an entry-level annual salary of not more than two-thirds of the maximum annual salary established for assistant clerks. The entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established. (1777, c. 115, s. 86; P. R.; R. C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C. S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983, c. 881, s. 9 authorized the Administrative Officer of Courts to develop and implement a formula for the allocation among the counties of assistant and deputy clerks of court.

Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 6, establishes 53 new deputy clerk positions to be allocated pursuant to the formula developed under Session Laws 1983, c. 881, s. 9.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 90, provides:

"The Administrative Officer of the Courts and each superior court clerk shall reclassify all accounting personnel, administrative assistant clerks, and legal officers as either assistant clerks or deputy clerks effective July 1, 1984; provided, notwithstanding the provisions of G.S. 7A-102(c), no full-time employee in service on June 30, 1984, shall suffer a reduction in salary as a result of the reclassification. The Administrative Officer of the Courts shall develop criteria for the number of assistant clerks and for the number of deputy clerks to be assigned to the office of each superior court clerk and shall report these criteria to the General Assembly upon the convening of the 1985 Session. In making his report to the 1985 General Assembly on staffing criteria for the office of superior court clerk, the Administrative Officer of the Courts shall include an analysis of the effects that automated operations are expected to have upon the personnel and total costs of the office of superior court clerk."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the last sentence of subsection (a) and added subsection (c).

§ 7A-113. Bookkeeping and accounting systems equipment.

Notwithstanding the provisions of G.S. 147-64.6(10), proposed changes in the kinds of bookkeeping and accounting systems equipment employed by the clerk of superior court shall be subject to review and approval by the Office of State Budget and Management. The Administrative Officer of the Courts shall, prior to implementing any change in the kinds of equipment, file with the Office of State Budget and Management a request for approval of the change, along with supporting information. If within 30 days of the filing of the request the Office of State Budget and Management has not disapproved the request, the request shall be deemed to be approved. (1983 (Reg. Sess., 1984), c. 1109, s. 9.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 14, makes this section effective July 1, 1984.

The reference in this section to § 147-64.6(10) was apparently intended to be a reference to § 147-64.6(c)(10).

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
1	3	Camden	1	2	
		Chowan	2	3	
		Currituck	1	2	
		Dare	3	5	
		Gates	2	3	
		Pasquotank	3	4	
		Perquimans	2	3	
2	3	Martin	5	8	
		Beaufort	4	5	
		Tyrrell	1	2	
		Hyde	2	4	
		Washington	3	4	
3	6	Craven	7	10	
		Pitt	10	12	Farmville, Ayden

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
		Pamlico	2	3	
		Carteret	5	8	
4	5	Sampson	6	8	
		Duplin	9	11	
		Jones	2	3	
		Onslow	8	11	
5	4	New Hanover	6	10	
		Pender	4	6	
6	3	Northampton	5	6	
		Halifax	9	14	Roanoke Rapids, Scotland Neck
		Bertie	4	5	
		Hertford	5	6	
7	4	Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	8	Mount Olive
		Greene	2	4	
		Lenoir	4	7	La Grange
9	4	Person	3	4	
		Granville	3	7	
		Vance	3	5	
		Warren	3	4	
		Franklin	3	6	
10	8	Wake	12	16	Apex Wendell Fuquay-Varina Wake Forest
11	4	Harnett	7	11	Dunn
		Johnston	10	12	Benson and Selma
		Lee	4	6	
12	6	Cumberland	10	17	
		Hoke	4	5	
13	4	Bladen	4	6	
		Brunswick	4	7	
		Columbus	6	8	Tabor City
14	4	Durham	8	11	
15A	3	Alamance	7	9	Burlington
15B	3	Orange	4	8	Chapel Hill
		Chatham	3	6	Siler City
16	4	Robeson	8	16	Fairmont Maxton Pembroke Red Springs Rowland St. Pauls

District	Judges	County	Magistrates Min.-Max		Additional Seats of Court
		Scotland	3	5	
17A	2	Caswell	2	5	
		Rockingham	4	9	Reidsville Eden Madison
17B	2	Stokes	2	4	
		Surry	5	8	Mt. Airy
18	8	Guilford	20	26	High Point
19A	4	Cabarrus	5	9	Kannapolis
		Rowan	5	10	
19B	2	Montgomery	2	4	
		Randolph	5	8	Liberty
20	5	Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	Hamlet
		Moore	5	8	Southern Pines
21	6	Forsyth	3	15	Kernersville
22	4	Alexander	2	3	
		Davidson	7	10	Thomasville
		Davie	2	3	
		Iredell	4	8	Mooresville
23	3	Alleghany	1	2	
		Ashe	3	4	
		Wilkes	4	6	
		Yadkin	3	5	
24	3	Avery	3	4	
		Madison	4	5	
		Mitchell	3	4	
		Watauga	4	6	
		Yancey	2	4	
25	5	Burke	4	7	
		Caldwell	4	7	
		Catawba	6	9	Hickory
26	11	Mecklenburg	15	26	
27A	4	Gaston	11	20	
27B	3	Cleveland	5	8	
		Lincoln	4	6	
28	4	Buncombe	6	13	
29	4	Henderson	4	6	
		McDowell	3	4	
		Polk	3	4	
		Rutherford	6	8	
		Transylvania	2	4	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
30	3	Cherokee	3	4	
		Clay	1	2	
		Graham	2	3	
		Haywood	5	7	Canton
		Jackson	3	4	
		Macon	3	4	
		Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 13, provides:

"The superior and district court judgeships created by sections 4 and 5 of this act shall be filled as follows:

"(1) Initial appointments to each of the superior court judgeships shall be made by the Governor for a term to expire on December 31, 1986.

"(2) Initial appointments to each of the district court judgeships shall be made by the Governor for a term to expire on the first Monday in December 1986."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, increased the number of District Court Judges in Judicial Districts 2, 12, 21 and 26.

Article 14.

District Judges.

§ 7A-144. (Effective until July 1, 1985) Compensation.

(a) Each judge shall receive the annual salary provided in the Budget Appropriations Act, and reimbursement on the same basis as State employees generally, for his necessary travel and subsistence expenses.

(b) Notwithstanding merit, longevity and other increment raises paid to regular State employees, a judge of the district court shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (1965, c. 310, s. 1; 1967, c. 691, s. 10; 1983, c. 761, s. 245; 1983 (Reg. Sess., 1984), c. 1109, ss. 11, 13.1.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 7A-144.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1109, ss. 11 and 13.1, effective July 1, 1984, deleted "and" following "five years of service," in the first sentence of subsection (b), added the language beginning "fourteen and four-tenths percent" at the end of that sentence, and rewrote the second sentence of subsection (b), which read "Service shall mean service as a justice or judge of the General Court of Justice."

§ 7A-144 is set out twice. See section heading for effective dates.

§ 7A-144. (Effective July 1, 1985) Compensation.

(a) Each judge shall receive the annual salary provided in the Current Operations Appropriations Act, and reimbursement on the same basis as State employees generally, for his necessary travel and subsistence expenses.

(b) Notwithstanding merit, longevity and other increment raises paid to regular State employees, a judge of the district court shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. (1965, c. 310, s. 1; 1967, c. 691, s. 10; 1983, c. 761, s. 245; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 7A-144.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1109, ss. 11 and 13.1, effective July 1, 1984, deleted "and" following "five years of service," in the first sentence of subsection (b), added the language beginning "fourteen and four-tenths percent" at the end of that sentence, and rewrote the second sentence of subsection (b), which read "Service shall mean service as a justice or judge of the General Court of Justice."

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 165, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

§ 7A-146. Administrative authority and duties of chief district judge.

The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:

(4) Assigning matters to magistrates, and consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a particular county shall be available for the performance of their duties to another district court judge or the clerk of the superior court, and the person to whom such authority is delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate; and

(1965, c. 310, s. 1; 1971, c. 377, s. 8; 1977, c. 945, s. 1; 1983, c. 586, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 85.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "another district court judge or the clerk of the superior court" for "an employee of the General Court of Justice within that particular county" near the middle of subdivision (4).

§ 7A-144 is set out twice. See section heading for effective dates.

CASE NOTES

Applied in Routh v. Weaver, — N.C. App. —, 313 S.E.2d 793 (1984).

ARTICLE 16.

Magistrates.

§ 7A-171. Numbers; appointment and terms; vacancies.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1109, s. 8, effective July 1, 1984, establishes seven new positions of magistrate, to be appointed in accordance with the provisions of this section.

§ 7A-171.1. Duty hours, salary, and travel expenses within county.

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

(1) A full-time magistrate, so designated by the Administrative Officer of the Courts, shall be paid the annual salary indicated in the table below according to the number of years he has served as a magistrate. The salary steps shall take effect on the anniversary of the date the magistrate was originally appointed:

Table of Salaries of Full-Time Magistrates

Number of prior years of service	*Annual salary*
Less than 1	$ 11,484
1 or more but less than 3	12,480
3 or more but less than 5	13,644
5 or more but less than 7	14,868
7 or more but less than 9	16,236
9 or more	17,772

A "Full-time magistrate" is a magistrate who is assigned to work an average of not less than 40 hours a week during his term of office.

Notwithstanding any other provision of this subdivision, a full-time magistrate, who was serving as a magistrate on December 31, 1978, and who was receiving an annual salary in excess of that which would ordinarily be allowed under the provisions of this subdivision, shall not have the salary, which he was receiving reduced during any subsequent term as a full-time magistrate. That magistrate's salary shall be fixed at the salary level from the table above which is nearest and higher than the latest annual salary he was receiving on December 31, 1978, and, thereafter, shall advance in accordance with the schedule in the table above.

(2) A part-time magistrate, so designated by the Administrative Officer of the Courts, shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during his term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does

the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

A "part-time magistrate" is a magistrate who is assigned to work an average of less than 40 hours of work a week during his term. No magistrate may be assigned an average of less than 10 hours of work a week during his term.

Notwithstanding any other provision of this subdivision, upon reappointment as a magistrate and being assigned to work the same or greater number of hours as he worked as a magistrate for a term of office ending on December 31, 1978, a person who received an annual salary in excess of that to which he would be entitled under the formula contained in this subdivision shall receive an annual salary equal to that received during the prior term. That magistrate's salary shall increase in accordance with the salary formula contained in this subdivision.

(3) Notwithstanding any other provision of this section, a beginning full-time magistrate with a two-year Associate in Applied Science degree in criminal justice or paralegal training from a North Carolina community college or technical institute or the equivalent degree from a private educational institution in North Carolina, may be initially employed at the annual salary provided in the table above for a magistrate with "3 or more but less than 5" years of service; a beginning full-time magistrate with a four-year degree from an accredited senior institution of higher education may be initially employed at the annual salary provided in the table above for a magistrate with "5 or more but less than 7" years of service; a beginning full-time magistrate who holds a law degree from an accredited law school may be employed at the annual salary provided in the table for a magistrate with "7 or more but less than 9" years of service; and a beginning full-time magistrate who is licensed to practice law in North Carolina may be initially employed at the annual salary provided in the table for a magistrate with "9 or more" years of service. Seniority increments for a magistrate with a two or four-year degree or a law degree described herein accrue thereafter at two-year intervals, as provided in the table.

Magistrates with a two or four-year degree or a law degree described herein who became magistrates before July 1, 1979 are entitled to an increase of three, five and seven years, respectively, in their seniority, for pay purposes only. Full-time magistrates licensed to practice law in North Carolina who became magistrates before July 1, 1979 are entitled to the pay of a magistrate with 9 or more years of service, and part-time magistrates holding a law degree or a license to practice law as described above who became magistrates before July 1, 1979 are entitled to a proportionate adjustment in their pay. Pay increases authorized by this subdivision are not retroactive.

(b) Notwithstanding G.S. 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote the catchline, designated the

introductory paragraph and its subdivisions (1) through (3) as subsection (a), increased the salaries in the salary schedule set forth in subdivision (a)(1), and added subsection (b).

§ 7A-177. Training course in duties of magistrate.

(a) Within six months of taking the oath of office as a magistrate for the first time, a magistrate is required to attend and satisfactorily complete a course of basic training of at least 40 hours in the civil and criminal duties of a magistrate. The Administrative Office of the Courts is authorized to contract with the Institute of Government or with any other qualified educational organization to conduct this training, and to reimburse magistrates for travel and subsistence expenses incurred in taking such training.

(b) Training courses shall be provided at such times and locations as necessary to assure that they are conveniently available to all magistrates without extensive travel to other parts of the State. Courses shall be provided in Asheville for the magistrates from the western region of the State. (1975, c. 956, s. 11; 1983 (Reg. Sess., 1984), c. 1116, s. 87.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, designated the first paragraph as subsection (a) and added subsection (b).

Article 17.

Clerical Functions in the District Court.

§ 7A-180. Functions of clerk of superior court in district court matters.

CASE NOTES

Applied in State v. Holloway, — N.C. App. —, 311 S.E.2d 707 (1984).

§ 7A-181. Functions of assistant and deputy clerks of superior court in district court matters.

CASE NOTES

Applied in State v. Holloway, — N.C. App. —, 311 S.E.2d 707 (1984).

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-192. By whom power of district court to enter interlocutory orders exercised.

CASE NOTES

Applied in Routh v. Weaver, — N.C. App. —, 313 S.E.2d 793 (1984).

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.

CASE NOTES

Cited in Satterfield v. Pappas, — N.C. App. —, 312 S.E.2d 511 (1984).

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.

CASE NOTES

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

Article 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.

§ 7A-258. Motion to transfer.

CASE NOTES

Whether to proceed in action pending motion to transfer rests within sound discretion of court. Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983).

Article 24B.

Termination of Parental Rights.

§ 7A-289.22. Legislative intent; construction of Article.

Legal Periodicals. —
For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

CASE NOTES

The decision to terminate parental rights is often a heartwrenching one for the court. On one hand, the court considers the interests of the parents who, despite shortcomings, have often formed a bond with his or her child. On the other hand, the court must consider the best interests of the child. In re Tate, — N.C. App. —, 312 S.E.2d 535 (1984).

When the interests of the child and parents conflict, the best interests of the child control. In re Tate, — N.C. App. —, 312 S.E.2d 535 (1984).

§ 7A-289.23. Jurisdiction.

CASE NOTES

Applied in In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983).

§ 7A-289.30. Adjudicatory hearing on termination.

Legal Periodicals. —
For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

CASE NOTES

For discussion of the due process evolution that has taken place in the area of parental rights, see In re Montgomery, 62 N.C. App. 343, 303 S.E.2d 324, cert. granted, 309 N.C. 192, 305 S.E.2d 734 (1983).

Applied in In re Norris, 25 N.C. App. 269, 310 S.E.2d 25 (1983); In re Pierce, — N.C. App. —, 312 S.E.2d 900 (1984).

Cited in In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983).

§ 7A-289.31. Disposition.

Legal Periodicals. —
For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

CASE NOTES

For discussion of the due process evolution that has taken place in the area of parental rights, see In re Montgomery, 62 N.C. App. 343, 303 S.E.2d 324, cert. granted, 309 N.C. 192, 305 S.E.2d 734 (1983).

§ 7A-289.32. Grounds for terminating parental rights.

Legal Periodicals. —
For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

CASE NOTES

Constitutionality. — See In re Wright, 64 N.C. App. 135, 306 S.E.2d 825 (1983).

Section is Not Unconstitutional. —
The standard of neglect to be applied under subdivision (2) of this section is not unconstitutionally vague. In re Norris, 25 N.C. App. 269, 310 S.E.2d 25 (1983).

For discussion of the due process evolution that has taken place in the area of parental rights, see In re Montgomery, 62 N.C. App. 343, 303 S.E.2d 324, cert. granted, 309 N.C. 192, 305 S.E.2d 734 (1983).

This section sets out the statutory grounds for terminating parental rights. A finding of any one of the seven separately enumerated grounds is sufficient to support a termination. In re Pierce, — N.C. App. —, 312 S.E.2d 900 (1984).

Neglect may be manifested, etc. —
One communication in a two-year period does not evidence the personal contact, love, and affection that inheres in the parental relationship. In re Graham, 63 N.C. App. 146, 303 S.E.2d 624, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983).

Alcohol abuse without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect. In re Phifer, — N.C. App. —, 312 S.E.2d 684 (1984).

Rights Properly Terminated. —
If a conclusion that grounds exist under any subdivision of this section is supported by findings of fact based on clear, cogent, and convincing evidence, the order terminating parental rights must be affirmed. In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983).

A threat of future harm is not sufficient grounds for termination of parental rights. In re Phifer, — N.C. App. —, 312 S.E.2d 684 (1984).

This section and § 7A-517(21) speak in terms of past neglect and make no provision for termination for threatened future harm. It is clear, however, that the Legislature was mindful of the plight of children threatened by a risk of future neglect, as shown by the terms of § 7A-544. Under that statute, the Department of Social Services may obtain temporary custody of a child where there is a risk of neglect by the parent or guardian. This supports the position that the Legislature was aware of the problem of future harm, and simply did not choose to make risk of neglect a grounds for termination of parental rights. In re Phifer, — N.C. App. —, 312 S.E.2d 684 (1984).

Applied in In re Sterling, 63 N.C. App. 562, 305 S.E.2d 769 (1983); In re Tate, — N.C. App. —, 312 S.E.2d 535 (1984); In re Moore, — N.C. App. —, 314 S.E.2d 580 (1984).

Stated in In re Barefoot, — N.C. App. —, 313 S.E.2d 924 (1984).

§ 7A-289.33. Effects of termination order.

CASE NOTES

Applied in In re Phifer, — N.C. App. —, 312 S.E.2d 684 (1984).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-300. Expenses paid from State funds.

CASE NOTES

Stated in In re Dunlap, — N.C. App. —, 310 S.E.2d 415 (1984).

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides:

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of four dollars ($4.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of five dollars ($5.00) in the district court, including cases before a magistrate, and the sum of twenty-three dollars ($23.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the

county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the retirement and insurance benefits of law-enforcement officers, the sum of three dollars ($3.00), to be remitted to the State Treasurer and administered as provided in Chapter 143, Article 12 and Article 12C, of the General Statutes.

(4) For support of the General Court of Justice, the sum of twenty-three dollars ($23.00) in the district court, including cases before a magistrate, and the sum of thirty dollars ($30.00) in the superior court, to be remitted to the State Treasurer.

(1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1034, s. 249.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "retirement and insurance benefits of law-enforcement officers" for "Law-Enforcement Officers' Benefit and Retirement Fund" and inserted "and Article 12C" in subdivision (a)(3).

CASE NOTES

Stated in In re Dunlap, — N.C. App. —, 310 S.E.2d 415 (1984).

§ 7A-305. Costs in civil actions.

CASE NOTES

Applied in Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983).

§ 7A-313. Uniform jail fees.

CASE NOTES

Stated in In re Dunlap, — N.C. App. —, 310 S.E.2d 415 (1984).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-341. (Effective July 1, 1985) Appointment and compensation of Director.

The Director shall be appointed by the Chief Justice of the Supreme Court, to serve at his pleasure. He shall receive the annual salary provided in the Current Operations Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally. Service as Director shall be equivalent to service as a superior court judge for the purposes of entitlement to retirement pay or to retirement for disability. (1965, c. 310, s. 1; 1967, c. 691, s. 36; 1983 (Reg. Sess., 1984), c. 1034, s. 165.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

§ 7A-342. (Effective July 1, 1985) Appointment and compensation of assistant director and other employees.

The assistant director shall also be appointed by the Chief Justice, to serve at his pleasure. The assistant director shall receive the annual salary provided in the Current Operations Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally.

The Director may appoint such other assistant and employees as are necessary to enable him to perform the duties of his office. (1965, c. 310, s. 1; 1967, c. 691, s. 37; 1983 (Reg. Sess., 1984), c. 1034, s. 165.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

ARTICLE 30.

Judicial Standards Commission.

§ 7A-375. Judicial Standards Commission.

CASE NOTES

Combination of Investigative and Judicial Functions Comports with Due Process. — The combination of the investigative and judicial functions within the Commission does not violate a respondent's due process rights. A combination of investigative and judicial functions within an agency does not violate due process. An agency which has only the power to recommend penalties is not required to establish an independent investigatory and adjudicatory staff. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 7A-376. Grounds for censure or removal.

CASE NOTES

I. GENERAL CONSIDERATION.

Each case arising from the Commission is to be decided upon its own facts. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Supreme Court is not bound by recommendations of the Commission and the court must consider all of the evidence and exercise its independent judgment as to whether it should censure, remand, or dismiss the proceedings against respondent. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Effect of Resignation of Judge, etc. — Assuming that a judge's resignation has been or will be accepted by the governor, but its effective date has not yet arrived, it does not deprive the Supreme Court of its jurisdiction over a proceeding for the removal of a judge for misconduct and conduct prejudicial to administration of justice. When a resignation specifies the time at which it will take effect, the resignation is not complete until that date arrives. Nor is the case rendered moot by the resignation. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

II. DEFINITIONS.

No Precise Rules or Definitions. — The terms "willful misconduct in office" and "conduct prejudicial to the administration of justice" are, like fraud, so multiform as to admit of no precise rules or definitions. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

III. ILLUSTRATIVE CASES.

A. Wrongful Conduct.

Disposition of cases for reasons, etc. — Any disposition of a case by a judge for reasons other than an honest appraisal of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Conduct need not be criminal in order to constitute willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Lack of Personal Benefit to Judge Does Not Preclude Prejudice from His Conduct. — The fact that a judge receives no personal benefit, financial or otherwise, from his improper handling of a case does not preclude his conduct from being prejudicial to the administration of justice. The determinative factors aside from the conduct itself, are the results of the conduct and the impact it might reasonably have upon knowledgeable observers. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Ex Parte or Other Communication as to Pending Proceeding. — A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

District Attorney Entitled to Notice of Disposition of Criminal Prosecution. — A criminal prosecution is an adversary proceeding in which the district attorney as an advocate of the State's interest, is entitled to be present and be heard. Any disposition of a criminal case without notice to the district attorney who was prosecuting the docket, when the

matter was not on the printed calendar for disposition, improperly excluded the district attorney from participating in the disposition. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Sexual Activities Between Judge and Defendant. — The use of a judge's office to grant leniency or favors to a defendant because of sexual activities between a judge and a defendant is willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

CASE NOTES

Each case arising from the Commission is to be decided upon its own facts. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Supreme Court is not bound by recommendations of the Commission and the court must consider all of the evidence and exercise its independent judgment as to whether it should censure, remand, or dismiss the proceedings against respondent. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Findings as to Character and Credibility Not Required. — The Commission is not required to make findings concerning a respondent's character or credibility. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Ex Post Facto Doctrine Inapplicable. — The ex post facto doctrine applies only to criminal prosecutions. Judicial disciplinary proceedings are not criminal actions. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Evidence of Conduct That Would Be Grounds for Impeachment prior to January 1, 1973. — The ex post facto doctrine does not prohibit the Commission from considering evidence of conduct by a judge that would constitute grounds for impeachment prior to January 1, 1973. The remedies provided by the establishment of the Commission on January 1, 1973, did not abolish removal proceedings by impeachment but are cumulative thereto. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

The quantum of proof required, etc. — The quantum of proof required to sustain the findings of the Commission is by clear and convincing evidence. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 7A-378. Censure or removal of justice of Supreme Court.

CASE NOTES

When Removal and Disqualification Proper. — A judge should be removed from office and disqualified from holding further judicial office only for the more serious offense of willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

CASE NOTES

I. GENERAL CONSIDERATION.

Where the court is required in a pretrial proceeding in superior court to inform a defendant of his right to counsel, it must be done in substantially the same manner as at

the first appearance in district court. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

Applied in State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

III. APPOINTMENT OF EXPERTS.

Discretion of Trial Judge. —

The appointment of an expert for an indigent defendant is a matter addressed to the trial judge's discretion and such appointment should be made with caution. State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

All defendants in criminal cases shall enjoy the right to effective assistance of counsel and that the State must provide indigent defendants with the basic tools for an adequate trial defense or appeal. However, the State has no constitutional duty to provide an expert witness to assist in the defense of an indigent. This is a question properly left within the sound discretion of the trial judge. State v. Watson, — N.C. —, 312 S.E.2d 448 (1984).

When Right to Expert Arises. —

In accord with 2nd paragraph in 1983 Cum. Supp. See State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

Expert assistance need only be provided by the State when the defendant can show it is probable that he will not receive a fair trial without the requested assistance, or upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense. Mere hope or suspicion that favorable evidence is available is not sufficient. State v. Watson, — N.C. —, 312 S.E.2d 448 (1984).

A defendant's constitutional right to effective assistance of counsel does not require that the State furnish a defendant with a particular service simply because the service might be of some benefit to his defense. State v. Cauthen, — N.C. App. —, 311 S.E.2d 649 (1984).

An indigent defendant does not have the same right to a second medical expert as a defendant who can afford to hire one. State v. Cauthen, — N.C. App. —, 311 S.E.2d 649 (1984).

A second expert opinion is necessary only when substantial prejudice will result from the denial of fees. State v. Cauthen, — N.C. App. —, 311 S.E.2d 649 (1984).

§ 7A-451. Scope of entitlement.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. McLain, 64 N.C. App. 571, 307 S.E.2d 769 (1983).

§ 7A-452. Source of counsel; fees; appellate records.

CASE NOTES

Cited in State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983).

§ 7A-454. Supporting services.

CASE NOTES

For the applicable standard, etc. —

Expert assistance need only be provided by the State when the defendant can show it is probable that he will not receive a fair trial

without the requested assistance, or upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense. Mere hope or suspicion that favorable evidence is available is not sufficient. State v. Watson, — N.C. —, 312 S.E.2d 448 (1984).

All defendants in criminal cases shall enjoy the right to effective assistance of counsel and that the State must provide indigent defendants with the basic tools for an adequate trial defense or appeal. However, the State has no constitutional duty to provide an expert witness to assist in the defense of an indigent. This is a question properly left within the sound discretion of the trial judge. State v. Watson, — N.C. —, 312 S.E.2d 448 (1984).

§ 7A-455. Partial indigency; liens; acquittals.

(b) In all cases the court shall fix the money value of services rendered by assigned counsel or the public defender, and such sum plus any sums allowed by the court for other necessary expenses of representing the indigent person, shall be entered as a judgment in the office of the clerk of superior court, and shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in subsection (a) of this section or any funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment; provided, that counsel fees ordered paid to the clerk on behalf of the appointed counsel pursuant to G.S. 15A-1343(e) may be paid directly to the counsel.

(1969, c. 1013, s. 1; 1983, c. 135, s. 2; 1983 (Reg. Sess., 1984), c. 1109, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "to the extent not reimbursed to the State by the indigent person as provided in subsection (a)" following "and such sum" in the first sentence of subsection (b), inserted "Any reimbursement to the State as provided in subsection (a) of this section or any" at the beginning of the second sentence of subsection (b), deleted "any" preceding "such judgment shall be deposited in the State treasury" near the middle of that sentence, and thereafter substituted "and credited against the judgment; provided, that" for "but".

§ 7A-457. Waiver of counsel; pleas of guilty.

CASE NOTES

II. WAIVER OF COUNSEL.

A. In General.

This section presupposes that a defendant has been informed of his rights and given an opportunity to act on the information as provided in § 15A-603. This involves a determination of defendant's indigency and entitlement to court appointed counsel. However, whether or not a defendant is indigent, any waiver must be in accordance with this section, notwithstanding the limiting language thereof. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

A defendant who appears without counsel at his arraignment must be properly informed of his rights in the manner required by § 15A-603. Where the defendant nevertheless wishes to waive counsel, the court must find that § 15A-603 has been complied with before a valid waiver can be made. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

ARTICLE 37.

The Public Defender.

§ 7A-465. Public defender; defender districts; qualifications; compensation.

The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts. Effective July 1, 1978, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A.

Effective January 1, 1981, the office of public defender is established in the third judicial district.

Effective June 1, 1983, the office of public defender is established in judicial district 15B.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office.

In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as a public defender. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 72; 1983 (Reg. Sess., 1984), c. 1034, s. 94.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the last paragraph.

§ 7A-467. (Effective until July 1, 1985) Assistant defenders; assigned counsel.

Each public defender is entitled to at least one full-time assistant public defender, and to such additional assistants, full-time or part-time, as may be authorized by the Administrative Office of the Courts. Assistants are appointed by the public defender and serve at his pleasure. Compensation of assistants shall be as provided in the biennial budget appropriations act. Assistants shall perform such duties as may be assigned by the public defender.

A member of the district bar who consents to such service may be assigned by the public defender to represent an indigent person, and when so assigned is entitled to the services of the defender's office to the same extent as a full-time public defender. In assigning assistant defenders and members of the bar generally the defender shall consider the nature of the case and the skill of counsel, to the end that all indigent persons are adequately represented.

If a conflict of interests prohibits the public defender from representing an indigent person, or in unusual circumstances when, in the opinion of the court the proper administration of justice requires it, the court may assign any member of the district bar to represent an indigent person, and when so

§ 7A-467 is set out twice. See section heading for effective dates.

assigned, counsel is entitled to the services of the defender's office to the same extent as counsel assigned by the public defender.

Members of the bar assigned by the defender or by the court are compensated in the same manner as assigned counsel are compensated in districts which do not have a public defender.

In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as an assistant public defender. (1969, c. 1013, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 93.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 7A-467.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the last paragraph.

§ 7A-467. (Effective July 1, 1985) Assistant defenders; assigned counsel.

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A member of the district bar who consents to such service may be assigned by the public defender to represent an indigent person, and when so assigned is entitled to the services of the defender's office to the same extent as a full-time public defender. In assigning assistant defenders and members of the bar generally the defender shall consider the nature of the case and the skill of counsel, to the end that all indigent persons are adequately represented.

If a conflict of interests prohibits the public defender from representing an indigent person, or in unusual circumstances when, in the opinion of the court the proper administration of justice requires it, the court may assign any member of the district bar to represent an indigent person, and when so assigned, counsel is entitled to the services of the defender's office to the same extent as counsel assigned by the public defender.

Members of the bar assigned by the defender or by the court are compensated in the same manner as assigned counsel are compensated in districts which do not have a public defender.

In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as an assistant public defender. (1969, c. 1013, s. 1; 1983 (Reg. Sess., 1984), c. 1034, ss. 93, 165.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 7A-467.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 7A-467 is set out twice. See section heading for effective dates.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 93, effective July 1, 1984, added the last paragraph.

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 165, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in the first paragraph of this section.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 41.

Purpose; Definitions.

§ 7A-516. Purpose.

CASE NOTES

The common thread running throughout the juvenile code is that the court must consider the child's best interests in making all placements whether at the dispositional hearing or the review hearing. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

§ 7A-517. Definitions.

Legal Periodicals. —

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

CASE NOTES

"Neglected" Child. —

Any child whose physical, mental or emotional condition has been impaired or is in danger of becoming impaired as a result of the failure of his or her parent to exercise that degree of care consistent with the normative standards imposed upon parents by society may be considered neglected. In re Thompson, 64 N.C. App. 95, 306 S.E.2d 792 (1983).

A child who is found to have been disciplined so severely that bruises and internal abrasions result is a "neglected" juvenile. In re Thompson, 64 N.C. App. 95, 306 S.E.2d 792 (1983).

For discussion of the due process evolution that has taken place in the area of parental rights, see In re Montgomery, 62 N.C. App. 343, 303 S.E.2d 324, cert. granted, 309 N.C. 192, 305 S.E.2d 734 (1983).

Neglect may be manifested, etc. —

Findings that the child's home is clean and that she is well fed and clothed are not dispositive on the issue of neglect. In re Thompson, 64 N.C. App. 95, 306 S.E.2d 792 (1983).

One communication in a two-year period does not evidence the personal contact, love, and affection that inheres in the parental relationship. In re Graham, 63 N.C. App. 146, 303 S.E.2d 624, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983).

Applied in State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983); In re Sterling, 63 N.C. App. 562, 305 S.E.2d 769 (1983); In re Raynor, 64 N.C. App. 376, 307 S.E.2d 219 (1983); In re Norris, 65 N.C. App. 269, 310 S.E.2d 25 (1983); In re Phifer, — N.C. App. —, 312 S.E.2d 684 (1984); In re Pierce, — N.C. App. —, 312 S.E.2d 900 (1984); In re Barefoot, — N.C. App. —, 313 S.E.2d 924 (1984).

Stated in In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

Cited in In re Phillips, — N.C. App. —, 311 S.E.2d 365 (1984).

§ 7A-467 is set out twice. See section heading for effective dates.

ARTICLE 44.

Screening of Abuse and Neglect Complaints.

§ 7A-543. Duty to report child abuse or neglect.

Legal Periodicals. —
For note discussing a new means to combat child abuse in light of State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), see 5 Camp. L. Rev. 415 (1983).

§ 7A-544. Investigation by Director; notification of person making the report.

CASE NOTES

Applied in In re Green, — N.C. App. —, 313 S.E.2d 193 (1984).

Stated in Ritter v. Kimball, — N.C. App. —, 313 S.E.2d 1 (1984).

§ 7A-551. Privileges not grounds for excluding evidence.

CASE NOTES

Section 8-53.1 is read in pari materia with the Juvenile Code, in particular, this section. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

Evidence That Defendant in Sexual Abuse Case Had Gonorrhea. — Unequivocal evidence that a seven-year old girl had been sexually abused would invoke this section and § 8-53.1. Therefore, medical records maintained by a county health department, revealing that defendant had been treated for gonorrhea, were admissible as evidence with regard to the cause or source of the child's disease. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

ARTICLE 45.

Venue; Petition; Summons.

§ 7A-561. Receipt of complaints; filing of petition.

CASE NOTES

The primary purpose to be served by signature and verification is to obtain the written and sworn statement of the facts alleged in such official and authoritative form as that it may be used for any lawful purpose, either in or out of a court of law. In re Green, — N.C. App. —, 313 S.E.2d 193 (1984).

The Juvenile Code requisites that the juvenile delinquency petition be signed and verified are essential to both the validity of the petition and to establishing the jurisdiction of the court. In re Green, — N.C. App. —, 313 S.E.2d 193 (1984).

§ 7A-565. Service of summons.

CASE NOTES

The statement on the return that service was accomplished implies that it was done in the manner required by law. In re Leggett, — N.C. App. —, 314 S.E.2d 144 (1984).

It is the service of summons, rather than the return of the officer, that confers jurisdiction. In re Leggett, — N.C. App. —, 314 S.E.2d 144 (1984).

ARTICLE 48.

Law-Enforcement Procedures in Delinquency Proceedings.

§ 7A-595. Interrogation procedures.

CASE NOTES

Applicability of section. — Whether defendant is a juvenile delinquent is irrelevant to a consideration of whether he is entitled to the protections of this section. State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983).

Where juvenile defendant was not informed of his right to have a parent, guardian or custodian present during questioning, there can be no finding that such defendant knowingly, willingly, and understandingly waived this privilege. State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983).

The failure to advise juvenile defendant of his right to have a parent, custodian or guardian present during questioning is not an error of constitutional magnitude because this privilege is statutory in origin and does not emanate from the Constitution. Therefore, the standard set forth in § 15A-1443(a) must be applied to determine whether the erroneous admission into evidence of defendant's statements to police officers is sufficient to warrant a new trial. State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983).

Applied in In re Wade, — N.C. App. —, 313 S.E.2d 862 (1984).

ARTICLE 51.

Hearing Procedures.

§ 7A-635. Quantum of proof in adjudicatory hearing.

CASE NOTES

The statutory use of "shall" is a mandate to trial judges requiring them to affirmatively state that the allegations of the juvenile petition are proved beyond a reasonable doubt. Failure to follow the mandate of the statute is error. In re Wade, — N.C. App. —, 313 S.E.2d 862 (1984).

§ 7A-637. Adjudication.

CASE NOTES

The statutory use of "shall" is a mandate to trial judges requiring them to affirmatively state that the allegations of the juvenile petition are proved beyond a reasonable doubt.

Failure to follow the mandate of the statute is error. In re Wade, — N.C. App. —, 313 S.E.2d 862 (1984).

§ 7A-640. Dispositional hearing.

CASE NOTES

Trial courts may properly consider all written reports and materials submitted in connection with dispositional proceedings. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

Article 52.

Dispositions.

§ 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

CASE NOTES

Stated in In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

§ 7A-649. Dispositional alternatives for delinquent juvenile.

CASE NOTES

Applied in In re Phillips, — N.C. App. —, 311 S.E.2d 365 (1984).

§ 7A-657. Review of custody order.

CASE NOTES

This section contemplates that a child will be returned to the parent from whose custody it was taken if the trial court finds sufficient facts to show that the child will receive proper care and supervision from that parent. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

Removal from one parent to another parent, simply put, does not fit neatly into the language in the first paragraph of this section. Consequently, the court must stress the significance of that portion of this section requiring the trial court to enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the child must be stressed. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

The common thread running throughout

the juvenile code is that the court must consider the child's best interests in making all placements whether at the dispositional hearing or the review hearing. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

The evidence of the strong emotional bonding between the father and child is critically important. It is not, however, determinative. It is but one factor the trial court must consider in determining what is in the best interest of the child. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983).

ARTICLE 53.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7A-664. Authority to modify or vacate.

CASE NOTES

Applied in In re Williamson, — N.C. App. —, 312 S.E.2d 239 (1984).

§ 7A-666. Right to appeal.

CASE NOTES

Applied in In re Williamson, — N.C. App. —, 312 S.E.2d 239 (1984).

§ 7A-667. Proper parties for appeal.

CASE NOTES

Applied in In re Williamson, — N.C. App. —, 312 S.E.2d 239 (1984).

ARTICLE 54.

Juvenile Records and Social Reports.

§ 7A-677. Effect of expunction.

(b) Notwithstanding subsection (a), in any delinquency case if the juvenile is the defendant and chooses to testify or if he is not the defendant and is called as a witness, the juvenile may be ordered to testify with respect to whether he was adjudicated delinquent. (1979, c. 815, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "criminal or" preceding "delinquency case" near the beginning of subsection (b).

§ 7A-678. Notice of expunction.

Upon expunction of a juvenile's record, the clerk of superior court shall send a written notice to the juvenile at his last known address informing him that the record has been expunged and with respect to the matter involved, the juvenile may inform any person that he has no record. The notice shall inform the juvenile further that if the matter involved is a delinquency record, the juvenile may inform any person that he was not arrested or adjudicated delinquent except that upon testifying in a delinquency proceeding, he may be required by a judge to disclose that he was adjudicated delinquent. (1979, c. 815, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 8.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "criminal or" preceding "delinquency proceeding" near the end of the second sentence.

Chapter 8.

Evidence.

Article 4.

Other Writings in Evidence.

Sec.
8-38. [Repealed.]
8-40. [Repealed.]
8-40.1. [Repealed.]

Article 7.

Competency of Witnesses.

8-51. [Repealed.]
8-51.1. Dying declarations.
Sec.
8-56. Husband and wife as witnesses in civil action.

Article 7A.

Restrictions on Evidence in Rape Cases.

8-58.6 to 8-58.11. [Repealed.]

Article 7B.

Expert Testimony.

8-58.12 to 8-58.14. [Repealed.]

Article 1.

Statutes.

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

CASE NOTES

The party seeking to have the law of a foreign jurisdiction apply has the burden of bringing such law to the attention of the court. If the foreign jurisdiction has no law, either statutory or decisional, on the question involved, the courts of this State will not speculate what law such jurisdiction might adopt and will apply the law of North Carolina. Leonard v. Johns-Manville Sales Corp., 308 N.C. 91, 305 S.E.2d 528 (1983).

Article 3.

Public Records.

§ 8-35. Authenticated copies of public records.

CASE NOTES

Section 14-7.4 is very similar in form and purpose to this section. State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984).

Article 4.

Other Writings in Evidence.

§ 8-38: Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 13, effective July 1, 1984.

§ 8-40: Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 12, effective July 1, 1984.

§ 8-40.1: Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 10, effective July 1, 1984.

§ 8-44.1. Hospital medical records.

CASE NOTES

Authenticating Hospital Records. — This section merely eliminated the necessity of taking original hospital records to court, where they were often kept for long periods to the dismay of record keepers and the inconvenience of those who needed to use the records for any purpose, including the later treatment of the patient. It did not modify the then-existing process of authenticating hospital records but, to the contrary, it ratified and reinforced the process by continuing to require authenticating testimony. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

The key to authenticating hospital records is not personal knowledge by anyone of particular entries or occurrences, but evidence of system and practice; evidence that a business-like system of compiling records exists, which requires that entries be made at or near the time involved by those who examine, observe, test and treat patients; and that in practice the system is generally followed. When that is testified to by someone familiar with the system, and the purported record involved is testified to be genuine, the authenticating process is complete. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

It is a matter of common knowledge among those familiar with hospital records that entries requiring dictation and transcription are done late by many doctors because they give priority to their other medical duties. Nevertheless, such entries, when regularly made, are still parts of the patients' record and should be so considered, except when there is evidence of duplicity or bad faith. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

It is not required that the authenticating proof be only by personal knowledge. Such a requirement would, for all intents and purposes, abrogate the use of business records in court; because under the conditions that most businesses and hospitals are conducted today, it is a rare person, indeed, that has personal knowledge of any work or undertaking done by others. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

§ 8-45. Itemized and verified accounts.

CASE NOTES

This statute is applicable only where there is no dispute about an account. Durham Life Broadcasting, Inc. v. International Carpet Outlet, Inc., 63 N.C. App. 787, 306 S.E.2d 459 (1983).

Sufficiency of Verification. —

Where the verifier has no personal knowledge of all the matters contained therein will not disqualify the exhibit as a verified statement if such verifier certifies familiarity with the books and records of the business and is competent to testify to their correctness. The law requires no more. VanLandingham v. Northeastern Motors, Inc., 63 N.C. App. 778, 306 S.E.2d 169, cert. denied, 309 N.C. 826, 310 S.E.2d 359 (1983).

In an action for accounting and tax services rendered, the different itemized bills for each period showing the services rendered, the time required, expenses incurred, charges made, the previous balance, the amount then due, and the different ledger sheets showing charges, payments, and balances all along, are ingredients enough for a good, verified statement of account. VanLandingham v. Northeastern Motors, Inc., 63 N.C. App. 778, 306 S.E.2d 169, cert. denied, 309 N.C. 826, 310 S.E.2d 359 (1983).

Unverified Statements, etc. —

Where it affirmatively appears from the record that the various entries on the papers comprising the exhibit admitted as a verified statement of account were made in the regular course of business, at or near the time of the transactions involved, and were authenticated by a witness familiar with the system under which they were made, the exhibit was admissible under the business records exception to the hearsay rule. VanLandingham v. Northeastern Motors, Inc., 63 N.C. App. 778, 306 S.E.2d 169, cert. denied, 309 N.C. 826, 310 S.E.2d 359 (1983).

ARTICLE 7.

Competency of Witnesses.

§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

CASE NOTES

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

§ 8-51: Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 5, effective July 1, 1984.

§ 8-51.1. Dying declarations.

Dying declarations admissible in administrative proceedings shall be as provided in G.S. 8C-1, Rule 804. (1973, c. 464, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 11.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote this section.

§ 8-53. Communications between physician and patient.

CASE NOTES

I. GENERAL CONSIDERATION.

Discretion of Trial Judge. — The statute affords the trial judges wide discretion in determining what is necessary for a proper administration of justice. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

II. NATURE AND SCOPE OF PRIVILEGE.

Application to Nurses, etc. —

This privilege includes entries in hospital records made by or under the direction of physicians and surgeons. However, this statute does

not include nurses, technicians and others, unless they were assisting, or acting under the direction of a physician or surgeon. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

Child Abuse Cases. — The physician-patient privilege, created by this section, is not available in cases involving child abuse. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

§ 8-53.1. Physician-patient privilege waived in child abuse.

CASE NOTES

This section is read in pari materia with the Juvenile Code, in particular, § 7A-551. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

Evidence That Defendant in Sexual Abuse Case Had Gonorrhea. — Unequivocal evidence that a seven-year old girl had been sexually abused would invoke this section and § 7A-551. Therefore, medical records maintained by a county health department, revealing that the defendant had been treated for gonorrhea, were admissible as evidence with regard to the cause or source of the child's disease. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

§ 8-53.3. Communications between psychologist and client.

CASE NOTES

Cited in State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

§ 8-54. Defendant in criminal action competent but not compellable to testify.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Farrow, — N.C. App. —, 310 S.E.2d 418 (1984).

IV. DEFENDANT NOT TESTIFYING.

C. Instructions to Jury.

1. Curative.

How Error Cured. — When a prosecutor improperly comments upon the accused's failure to testify, the error may be cured if the trial judge (1) sustains an objection to the comment; (2) tells the jury that the comment was improper; and (3) instructs the jury to disregard the comment and not to consider the failure of the accused to offer himself as a witness. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983).

What Instruction Must State. — An instruction by the trial court immediately after sustaining an objection to a prosecutor's comment on the defendant's failure to testify, that the defendant's exercise of his right not to testify shall not be used against him, is insufficient absent an instruction that the argument was improper and that it should be disregarded. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983).

To be effective, the trial court's instruction should immediately follow the offensive remark and should explain why the remark was improper. The fact that the remark was made by a private prosecutor makes no difference. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983).

4. Improper.

Failure to State That Remark Improper. — Court's instruction to disregard the remark, "Why in the world did the defendant sit here for these one-and-a-half days remaining mute and not come to the stand?" was insufficient where the court did not instruct that the remark was improper nor why it was improper. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983).

§ 8-56. Husband and wife as witnesses in civil action.

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (1866, c. 43, ss. 3, 4; C. C. P., s. 341; Code, s. 588; Rev., s. 1636; 1919, c. 18; C. S., s. 1801; 1945, c. 635; 1977, c. 547; 1983 (Reg. Sess., 1984), c. 1037, s. 3.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted the former second sentence of this section, which read "Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by a married person in which the character of the spouse is assailed, that spouse shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband and wife shall be competent to prove, and may be required to prove, the fact of marriage."

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Williamson v. Williamson, — N.C. App. —, 311 S.E.2d 325 (1984).

§ 8-57.2. Presumed father or mother as witnesses where paternity at issue.

CASE NOTES

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

ARTICLE 7A.

Restrictions on Evidence in Rape Cases.

§§ 8-58.6 to 8-58.11: Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 2, effective July 1, 1984.

ARTICLE 7B.

Expert Testimony.

§§ 8-58.12 to 8-58.14: Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 9, effective July 1, 1984.

ARTICLE 10.

Depositions.

§ 8-81. Objection to deposition before trial.

CASE NOTES

Cited in Moore v. Reynolds, 63 N.C. App. 160, 303 S.E.2d 839 (1983).

ARTICLE 13.

Photographs.

§ 8-97. Photographs as substantive or illustrative evidence.

Legal Periodicals. —
For survey of 1982 law on evidence, see 61 N.C.L. Rev. 1126 (1983).

CASE NOTES

Applied in State v. Snyder, — N.C. App. —, 310 S.E.2d 799 (1984).

Chapter 8C.
Evidence Code.

Sec.
8C-1. Rules of Evidence.

Article 11.

Miscellaneous Rules.

Rule
1101. Applicability of rules.

§ 8C-1. Rules of Evidence.

The North Carolina Rules of Evidence are as follows:

Article 1.

General Provisions.

Rule 104. Preliminary questions.

Editor's Note. — In the seventh paragraph of the Commentary under this rule, the phrase "The second sentence of subdivision (b)" should read instead "The second sentence of subdivision (a)."

Article 6.

Witnesses.

Rule 615. Exclusion of witnesses.

CASE NOTES

Stated in State v. Stanley, — N.C. —, 312 S.E.2d 482 (1984).

Article 11.

Miscellaneous Rules.

Rule 1101. Applicability of rules.

(b) Rules inapplicable. — The rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary Questions of Fact. — The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand Jury. — Proceedings before grand juries.

(3) Miscellaneous Proceedings. — Proceedings for extradition or rendition; first appearance before district court judge on probable cause hearing in criminal cases; sentencing, or granting or revoking

probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. — Contempt proceedings in which the court is authorized by law to act summarily. (1983, c. 701, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 14.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "juvenile proceedings, except those under G.S. 7A-634(a)" at the end of subdivision (b)(3).

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-3. Qualifications of prospective jurors.

CASE NOTES

Cited in Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983).

Chapter 14.

Criminal Law.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Article 14.

Burglary and Other Housebreakings.

Sec.
14-55. Preparation to commit burglary or other housebreakings.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 20.

Frauds.

14-118.5. Theft of cable television service.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 29.

Bribery.

14-217. Bribery of officials.

Article 31.

Misconduct in Public Office.

Sec.
14-250. Publicly owned vehicle to be marked.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries, Gaming, Bingo and Raffles.

Part 2. Bingo and Raffles.

14-309.5. Bingo.
14-309.6. Definitions.
14-309.7. Licensing procedure.
14-309.8. Limit on sessions.
14-309.9. Bingo prizes.
14-309.10. Operation of bingo.
14-309.11. Accounting and use of proceeds.
14-309.12. Violation is gambling.
14-309.13. Public sessions.
14-309.14. Beach bingo.
14-309.15. Raffles.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

§ 14-1.1. Punishment for felonies occurring on and after July 1, 1981.

CASE NOTES

Discretion as to Severity of Sentence Limited by this Section. — Except for maximum sentence limitations in this section, the severity of a sentence imposed pursuant to the Fair Sentencing Act, § 15A-1340.1 et seq., insofar as it is based on a weighing of aggravating and mitigating factors, is within the discretion of the judge. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983).

Applied in State v. Ziglar, 308 N.C. 747, 304 S.E.2d 206 (1983); State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983); State v. Simmons, 64 N.C. App. 727, 308 S.E.2d 95 (1983); State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983); State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984).

Cited in State v. Wilhite, 308 N.C. 798, 303 S.E.2d 788 (1983).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. Green, — N.C. —, 312 S.E.2d 434 (1984).

§ 14-4. Violation of local ordinances misdemeanor.

CASE NOTES

Cited in Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

ARTICLE 2.

Principals and Accessories.

§ 14-5.2. Accessory before fact punishable as principal felon.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983); State v. Fletcher, — N.C. App. —, 310 S.E.2d 787 (1984).

II. ACCESSORIES BEFORE THE FACT.

Who Is Accessory before the Fact. —
Under this section a defendant not actually or constructively present at the scene is guilty and punishable as a principal if it be shown that he counseled or procured or commanded the others to perpetrate the crime. State v. Bradley, — N.C. App. —, 312 S.E.2d 519 (1984).

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.

CASE NOTES

This article does not authorize an independent proceeding to establish a defendant's status as an habitual felon. One must be charged as an habitual felon prior to the entry of a plea or a conviction on the substantive offense. Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

Properly construed this article clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the State seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

The prosecution may not use the conviction of the substantive felony to satisfy the requirements of this article. Simply stated, a person may not be indicted as an habitual felon until he is indicted for his fourth felony offense. Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

§ 14-7.5. Verdict and judgment.

CASE NOTES

Applied in State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984).

§ 14-7.6. Sentencing of habitual felons.

CASE NOTES

Applied in State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

Legal Periodicals. —

For note discussing North Carolina's capital sentencing procedure, see 62 N.C.L. Rev. 833 (1984).

For article discussing shortcomings of the North Carolina homicide law, see 19 Wake Forest L. Rev. 331 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Quoted in State v. Hinson, — N.C. —, 311 S.E.2d 256 (1984).

Cited in Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984).

II. MOTIVE AND INTENT TO KILL GENERALLY.

The intent to kill must arise from a fixed determination previously formed after weighing the matter. State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983).

III. MURDER IN THE FIRST DEGREE.

A. Defined.

Murder in the first degree, etc. —

In accord with 1st paragraph in original. See State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983).

Same — Deliberation Defined. —

In accord with 3rd paragraph in original. See State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

In accord with 3rd paragraph in 1983 Cum. Supp. See State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983); State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983).

B. Premeditation and Deliberation.

1. In General.

Same — Premeditation Defined. —

In accord with 1st paragraph in original. See State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Premeditation is thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983).

Killing committed during the course of a quarrel, etc. —

The fact that there was a quarrel does not preclude the possibility that the defendant formed the intent to kill with premeditation and deliberation. State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983).

2. Proof.

Proof of Premeditation and Deliberation Is Proof of Intent to Kill. — Since a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

E. Murder Committed in Perpetration of a Felony.

Independent proof of the underlying felony in a felony murder prosecution is not necessary where a confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony. State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983).

It is proper to show solely by a defendant's confession that the homicide was murder in the first degree by showing that the murder was committed in the perpetration of another felony. State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983).

IV. MURDER IN THE SECOND DEGREE.

A. In General.

What Constitutes, etc. —

In accord with 1st paragraph in original. See State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

State need not prove malice and unlawfulness unless there is some evidence of their nonexistence, but once such evidence is presented, the State must prove these elements beyond a reasonable doubt. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

B. Malice in General.

Definition. —

Any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person is sufficient to supply the malice necessary for second-degree murder. Such an act will always be accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Malice may be expressed or implied and it need not amount to hatred or ill will, but may be found if there is an intentional taking of the life of another without just cause, excuse or justification. State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

Proof — Death Ensuing, etc. —

In accord with original. See State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

The fact that a defendant struck a person with his hand or kicked a person and proximately caused that person's death would not support either a presumption of malice as a matter of law or an inference of malice as a

matter of fact unless the defendant was then using his hands or feet as deadly weapons. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Whether an attack made with hands or feet alone which proximately causes death gives rise to either a presumption of malice as a matter of law or to an inference of malice as a matter of fact will depend upon the facts of the particular case. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

C. Intentional Killing with a Deadly Weapon.

Intentional Killing, etc. —

In accord with 6th paragraph in original. See State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

An intentional assault upon another with a deadly weapon which proximately causes death gives rise to two presumptions: (1) that the killing was unlawful and (2) that it was done with malice and, nothing else appearing, the person who perpetrated such assault would be guilty of murder in the second degree. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Rebuttal of Presumption — If there, etc. —

In accord with 1st paragraph in original. See State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Instruction Where There Is No Evidence of Heat of Passion, Provocation, or Self-Defense. — If, after the mandatory presumptions as to unlawfulness of the killing and as to malice arise, there is no evidence that the killing was in the heat of passion on sudden provocation or in self-defense, the law requires that the jury be instructed that the defendant must be convicted of murder in the second degree. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Presumption of Malice Disappears Where Evidence of Self-Defense or Provocation. — When there is some evidence justifying an instruction concerning self-defense or heat of passion killing upon sudden provocation, any presumption of malice arising from a finding that defendant intentionally inflicted the wounds with a deadly weapon disappears, leaving only a permissible inference which the jury may accept or reject. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

V. DEFENSES AND DENIALS.

D. Intoxication.

No inference of the absence of deliberation and premeditation arises from intoxication as a matter of law because intoxication does not necessarily render a person incapable of engaging in the thought processes of premeditation and deliberation. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Degree of Intoxication, etc. —

In accord with 1st paragraph in original. See State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Effect of Intoxication, etc. —

In accord with 2nd paragraph in original. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

VI. PRACTICE AND PROCEDURE.

F. Sufficiency of Evidence.

1. First-Degree Murder.

In General — Preliminary Question, etc. —

In order for the trial court to submit a charge of first-degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally shot and killed the victim with malice, premeditation and deliberation. "Substantial evidence" is that amount of relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983).

Felony-Murder — Killing in Perpetration of Robbery. —

Where the killing was committed in the perpetration of robbery with a dangerous weapon, the crime was murder in the first degree. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

G. Instructions to Jury.

1. Instructions Concerning Degree of Offense Charged.

When Jury Must Be Instructed, etc. —

The law requires a showing of strong provocation before it will grant a defendant who is charged with second-degree murder a jury instruction on the lesser included offense of voluntary manslaughter. Evidence that the deceased threw a cigarette butt at defendant does not rise to the level of serious provocation required. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

2. Other Instructions.

Presumptions as to Use of Hands and Feet as Deadly Weapons. — Nothing else appearing, the trial court properly could instruct the jury that, should they find the defendant used his hands or feet as deadly weapons and intentionally inflicted a wound upon the deceased proximately causing his death, the law presumes that the killing was unlawful and done with malice. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

§ 14-18. Punishment for manslaughter.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Rivers, 64 N.C. App. 554, 307 S.E.2d 588 (1983).

Stated in State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984).

Cited in State v. Mitchell, — N.C. App. —, 313 S.E.2d 201 (1984).

II. MANSLAUGHTER.

A. In General.

Definitions. —

One who kills a human being under the influence of sudden passion, produced by adequate provocation, sufficient to negate malice, is guilty of manslaughter. State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

Manslaughter is a lesser, etc. —

In accord with original. See State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

B. Voluntary.

Definitions. —

In accord with 1st paragraph in original. See State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

C. Involuntary.

Definitions. —

In accord with 7th paragraph in original. See State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

For discussion of involuntary manslaughter, see State v. Crisp, 64 N.C. App. 493, 307 S.E.2d 776 (1983).

IV. RECKLESS USE OF FIREARMS.

Deaths Caused by Wanton, etc. —

In accord with 1st paragraph in original. See State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

VII. INSTRUCTIONS TO JURY.

Voluntary Manslaughter as Lesser Included Offense. — The law requires a showing of strong provocation before it will grant a defendant who is charged with second-degree murder a jury instruction on the lesser included offense of voluntary manslaughter. Evidence that the deceased threw a cigarette butt at defendant does not rise to the level of serious provocation required. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Charge of Involuntary Manslaughter Held Error. —

Where the record in a first-degree murder prosecution contained no evidence which tended to show that the victim died as the result of an unlawful act not amounting to a felony or as the result of an unlawful act that was not naturally dangerous to human life, it was error to permit the jury to consider the issue of involuntary manslaughter, and since it appeared that there was a reasonable possibility that the defendant would have been acquitted if the involuntary manslaughter issue had not been submitted, the error had to be held prejudicial. State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

ARTICLE 7A.

Rape and Other Sex Offenses.

§ 14-27.1. Definitions.

Legal Periodicals. —

For note discussing "serious personal injury" in rapes and sexual offenses in light of State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982), see 19 Wake Forest L. Rev. 881 (1983).

§ 14-27.2. First-degree rape.

Legal Periodicals. —

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note discussing "serious personal injury" in rapes and sexual offenses in light of State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982), see 19 Wake Forest L. Rev. 881 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Second-Degree Rape Compared. — One difference between rape in the first degree under subdivision (a)(2)a of this section and rape in the second degree under § 14-27.3 is that in the former but not in the latter a deadly weapon must have been used to effectuate the rape. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Applied in State v. Stanley, — N.C. —, 312 S.E.2d 482 (1984); State v. Goforth, — N.C. App. —, 313 S.E.2d 595 (1984).

Stated in State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984).

Cited in State v. Wilhite, 308 N.C. 798, 303 S.E.2d 788 (1983); State v. Norris, 65 N.C. App. 336, 309 S.E.2d 507 (1983); State v. Whitfield, — N.C. —, 313 S.E.2d 790 (1984).

§ 14-27.3. Second-degree rape.

CASE NOTES

Cited in State v. Norris, 65 N.C. App. 336, 309 S.E.2d 507 (1983).

§ 14-27.4. First-degree sexual offense.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

Aider and Abettor Is as Guilty as Principal Offender. — Under the statutory scheme, a person who commits a sexual act with another person by force and against the will of the other person, and who also is aided and abetted by one or more persons is guilty of a first-degree sexual offense. An aider and abettor is as guilty as the principal offender, and thus an aider and abettor of any sexual offense ipso facto becomes guilty of a first-degree offense. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

Under this section, an aider and abettor of a sexual offense is guilty of a first-degree sexual offense or nothing at all. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

Legislative Intent as to Punishment of Aiders and Abettors. — It is evident that the legislature, by its enactment of subdivision (a)(2)c of this section, chose to include in the more serious first-degree categories those sexual offenses which involved aiders and abettors and to subject to a harsher penalty those who participated in gang assaults, regardless of the actual role of the participant. In so doing, the legislature acknowledged the increased severity of rapes and other sexual offenses committed by persons acting in concert. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

Conviction for Aiding and Abetting Is Not Double Jeopardy. — One who was convicted of first-degree sexual offense by reason of his aiding and abetting a first-degree sexual offense committed by two other persons has been convicted of only one offense. He was not subjected to multiple convictions or to enhanced punishment by an improper use of the same element twice. Since defendant's acts of assistance were properly used under the statute to elevate the charges against his codefendants to first-degree offenses in the first instance, defendant's acts of aiding and abetting were used against him only once, that is, to find him guilty of the crime of first-degree sexual offense by reason of aiding and abetting. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

Deadly weapon does not have to be one that kills. State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983).

Where there is a question as to a weapon's deadly or dangerous nature, it is properly submitted to the jury. State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983).

Child's uncertainty as to the time or particular day the offense was committed goes

to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Applied in State v. Warren, 309 N.C. 224, 306 S.E.2d 446 (1983); State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983).

Cited in State v. Thomas, — N.C. —, 312 S.E.2d 458 (1984).

§ 14-27.6. Penalty for attempt.

CASE NOTES

Applied in State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983); State v. Horner, — N.C. —, 311 S.E.2d 281 (1984); State v. Robinson, — N.C. —, 313 S.E.2d 571 (1984).

§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

CASE NOTES

Applied in State v. Goforth, — N.C. App. —, 313 S.E.2d 595 (1984).

ARTICLE 8.

Assaults.

§ 14-31. Maliciously assaulting in a secret manner.

CASE NOTES

What Constitutes Secret Assault. —
In the context of an assault case, "lying in wait" is nothing more or less than taking the victim by surprise, an element of secret assault, a separate but joinable offense. State v. Puckett, — N.C. App. —, 312 S.E.2d 207 (1984).

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Lesser Included Offenses. —
In accord with 4th paragraph in original. See State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Misdemeanor Assault Compared. — The primary distinction between felonious assault under this section and misdemeanor assault under § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used and serious injury resulted,

while if the evidence shows that only one of the two elements was present, i.e., that either a deadly weapon was used or serious injury resulted, the offense is punishable only as a misdemeanor. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Use of Deadly Weapon May Not Be Considered in Aggravation. — Since use of a deadly weapon is an element of the crime of felonious assault, it may not also be considered as a factor in aggravation. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

The trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defendant is convicted of an assault under this section. State v. Braswell, — N.C. App. —, 313 S.E.2d 216 (1984).

Applied in State v. Boykin, 310 N.C. 118, 310 S.E.2d 315 (1984); State v. Brindle, — N.C. App. —, 311 S.E.2d 692 (1984).

Stated in State v. Greene, — N.C. App. —, 314 S.E.2d 262 (1984).

Cited in State v. Whitfield, — N.C. —, 313 S.E.2d 790 (1984); State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

VI. SERIOUS INJURY.

Factors the courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

Legal Periodicals. —

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Implied Intent. — Even though intent is an essential element of criminal assault, the intent may be implied from culpable or criminal negligence if the injury or apprehension thereof is the direct result of intentional acts done under circumstances which show a reckless disregard for the safety of others and a willingness to inflict injury. State v. Davis, — N.C. App. —, 314 S.E.2d 828 (1984).

Felonious Assault Compared. — The primary distinction between felonious assault under § 14-32 and misdemeanor assault under this section is that a conviction of felonious assault requires a showing that a deadly weapon was used and serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that either a deadly weapon was used or serious injury resulted, the offense is punishable only as a misdemeanor. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Factors the courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

II. INCLUDED OFFENSES.

Misdemeanor assault with a deadly weapon is a lesser included offense of felonious assault with a deadly weapon. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Stated in State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984).

IV. ASSAULTS ON LAW-ENFORCEMENT OFFICERS.

Purpose. — This section is designed to protect the State's law enforcement officers from bodily injury and threats of violence. State v. Davis, — N.C. App. —, 314 S.E.2d 828 (1984).

Where defendant has been illegally restrained under the Fourth Amendment, he has the right to use only such force as reasonably appears necessary to prevent the unlawful restraint of his liberty. State v. Harrell, — N.C. App. —, 312 S.E.2d 230 (1984).

Defendant's act of striking officer in the face was an unnecessary show of force in response to the officer's retention of his license and request to search his car. Defendant was, therefore, properly charged under subdivision (b)(4) of this section. State v. Harrell, — N.C. App. —, 312 S.E.2d 230 (1984).

§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

CASE NOTES

When Section Violated. —

The repeated discharge of a firearm toward the house and the resultant striking of the house by the bullets so discharged is evidence of something more than the firing of a stray bullet which accidentally strikes the dwelling. Such conduct manifests an intentional disregard of and indifference to the rights and safety of others, and supports elements of the offense of discharging a firearm into an occupied dwelling to require its submission to the jury. State v. Watson, — N.C. App. —, 311 S.E.2d 381 (1984).

Same — Building Must Be Occupied. —

A person is guilty of the felony created by this section if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building when he has reasonable grounds to believe that the building might be occupied by one or more persons. State v. Watson, — N.C. App. —, 311 S.E.2d 381 (1984).

Applied in State v. Moose, — N.C. —, 313 S.E.2d 507 (1984).

Article 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

CASE NOTES

I. GENERAL CONSIDERATION.

Subsections (a) and (b) Must Be Read Together. — By amending subsection (b) of this section, the legislature manifested its intent that there would be two degrees of kidnapping. The language of subsection (a) creates and defines the offense of kidnapping. The language of subsection (b) addresses the degree of the crime. The two subsections must be read together to determine the elements of first-degree kidnapping. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Release in Safe Place by Defendant Must Be Voluntary. — While it is true that subsection (b) of this section does not expressly state that defendant must voluntarily release the victim in a safe place, a requirement of "voluntariness" is inherent in the statute. The language "in a safe place by the defendant" implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Applied in State v. Partridge, — N.C. App. —, 311 S.E.2d 53 (1984); State v. Alston, — N.C. —, 312 S.E.2d 470 (1984).

Stated in Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

Cited in State v. Little, — N.C. App. —, 312 S.E.2d 695 (1984).

II. WHAT CONSTITUTES KIDNAPPING.

A. In General.

Likewise Crime May Be Committed, etc. —

In accord with 3rd paragraph in original. See State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Subsection (a) of this section, etc. —

The language of subsection (a) of this section creates and defines the offense of kidnapping. The language of subsection (b) of this section addresses the degree of the crime and defines kidnapping in the first degree as a kidnapping in which the defendant does not release the victim in a safe place or in which he seriously injures the victim or sexually assaults the victim. The two subsections taken together establish the elements of kidnapping in the first degree. State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984).

When Person Is Guilty, etc. —

The language of subsection (b) of this section states essential elements of the offense of kidnapping in the first degree and does not relate to matters in mitigation of punishment. To properly convict a defendant of kidnapping in the first degree, the State must allege and prove the applicable elements of both subsections (a) and (b) of this section. State v. Corley,

310 N.C. 40, 311 S.E.2d 540 (1984).

Where trial court failed to submit the essential element of kidnapping in the first degree but court essentially submitted to the jury the offense of kidnapping in the second degree, the jury's verdict of kidnapping in the first degree will be considered a verdict of guilty of kidnapping in the second degree. State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984).

III. PRACTICE AND PROCEDURE.

B. Indictment.

Applicable Elements of Both Subsections (a) and (b) Must Be Alleged. — The language of subsection (b) of this section states essential elements of the offense of first-degree kidnapping and does not relate to matters in mitigation of punishment. In order for the State to properly indict a defendant for first-degree kidnapping, the State must allege the applicable elements of both subsection (a) and subsection (b). State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

ARTICLE 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-49. Malicious use of explosive or incendiary; attempt; punishment.

CASE NOTES

Cited in State v. Moose, — N.C. —, 313 S.E.2d 507 (1984).

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.

CASE NOTES

Applied in State v. Williams, — N.C. App. —, 313 S.E.2d 170 (1984).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

CASE NOTES

II. ELEMENTS OF OFFENSE.

A. In General.

Constructive breaking, etc. — In accord with 1st paragraph in original. See State v. Smith, 65 N.C. App. 770, 310 S.E.2d 115 (1984).

A constructive breaking is as sufficient a breaking for the purposes of this offense as any physical removal by the defendant of a barrier

to entry. State v. Smith, 65 N.C. App. 223, 310 S.E.2d 115 (1984).

Since nine o'clock at night in January in this longitude is two hours or more after darkness begins, that evidence justifies the inference that the breaking and entry also occurred during the dark of night. State v. Squalls, 65 N.C. App. 599, 309 S.E.2d 558 (1983).

Defendant Need Not Retain Intent Throughout Intrusion. — The intent to commit a felony must exist at the time of entry, but it is not necessary that defendant retain that intent throughout the intrusion. State v. Norris, 65 N.C. App. 336, 309 S.E.2d 507 (1983).

Whether House Is Occupied Is for Jury. — The question whether a house is actually occupied at the time an intruder breaks and enters is for the jury. State v. Simons, 65 N.C. App. 164, 308 S.E.2d 502 (1983).

B. First Degree.

Proof that the offense was planned is not an essential element of burglary in the first degree. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

C. Second Degree.

Dwelling Need Only Be Momentarily Unoccupied. — If the burglarized dwelling is occupied, the crime is burglary in the first degree; but, if it is unoccupied, however momentarily, and whether known to the intruder or not, the crime is burglary in the second degree. State v. Simons, 65 N.C. App. 164, 308 S.E.2d 502 (1983).

§ 14-52. Punishment for burglary.

CASE NOTES

Applied in State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983).

§ 14-53. Breaking out of dwelling house burglary.

CASE NOTES

Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of §§ 14-51, 14-53, 14-54 or 14-57. State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984).

§ 14-54. Breaking or entering buildings generally.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Moore, 62 N.C. App. 431, 303 S.E.2d 230 (1983); State v. Simons, 65 N.C. App. 164, 308 S.E.2d 502 (1983); State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983); State v. Hankins, — N.C. —, 313 S.E.2d 579 (1984).

Stated in In re Mash, 63 N.C. App. 130, 303 S.E.2d 660 (1983); State v. Hankins, 64 N.C. App. 324, 307 S.E.2d 440 (1983); State v. Downing, — N.C. App. —, 311 S.E.2d 702 (1984).

Cited in State v. Reid, — N.C. App. —, 311 S.E.2d 675 (1984).

II. ELEMENTS OF THE OFFENSE.

A. In General.

What Constitutes Offense, etc. —

To prove a defendant guilty of felonious breaking or entering, it is not necessary to prove that he was also guilty of larceny. Rather

it is only necessary to prove that the defendant intended to commit a felony, to wit, larceny. State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984).

Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of §§ 14-51, 14-53, 14-54 or 14-57. State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984).

B. Intent.

Evidence tending to show an unexplained breaking or entering into a dwelling at night, accompanied by flight when discovered, is sufficient under the law to support the inference that the breaking or entering was done with the intent to steal or commit a felony. The intent inferred is sufficient under the law to support a charge of felonious breaking or entering and warrant its submission to the jury. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983).

§ 14-55. Preparation to commit burglary or other housebreakings.

If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be punished as a Class H felon. (Code, s. 997; Rev., s. 3334; 1907, c. 822; C.S., s. 4236; 1969, c. 543, s. 4; 1979, c. 760, s. 5.)

Editor's Note. — This section is set out above to correct an error in the Replacement Volume and an error in the 1983 Cumulative Supplement.

CASE NOTES

Cited in State v. Martin, — N.C. App. —, 313 S.E.2d 15 (1984).

§ 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

CASE NOTES

Chain Lock on Hood of Car Does Not Preclude Finding of Entry. — The mere fact that a chain lock on the hood of a car prevented the hood from opening beyond 12-18 inches does not preclude a finding that there was an entry. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Evidence Held to Establish Entry. — Although there was no testimony that either defendant was actually seen with a portion of his body under the hood of the car, testimony of the arresting officer that one defendant was squatting down and looking up under the hood, which the other defendant was trying to raise, led to the obvious conclusion that there was an entry. Certainly, when one raises the hood of a car he must first extend some portion of his hand beneath the hood to release the hood latch. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Stated in State v. Smith, 65 N.C. App. 770, 310 S.E.2d 115 (1984).

§ 14-57. Burglary with explosives.

CASE NOTES

Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of §§ 14-51, 14-53, 14-54 or 14-57. State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

§ 14-62. Burning of churches and certain other buildings.

CASE NOTES

I. GENERAL CONSIDERATION.

"Willfulness" and "Wantonness" Defined. — "Willfulness" means the wrongful doing of an act without justification or excuse. "Wantonness" means the doing of an act in conscious and intentional disregard of an indifference to the rights and safety of others. State v. Oxendine, 64 N.C. App. 559, 307 S.E.2d 583 (1983).

Attempt to draw a sharp line between a "wilful" act and a "wanton" act would be futile. The elements of each are substantially the same. State v. Oxendine, 64 N.C. App. 559, 307 S.E.2d 583 (1983).

Closing of a shopping center's doors to the public after being damaged by a fire does not in and of itself take a business premises outside the operation of this section. It was proper to charge arson under this section for a fire occurring one week later, although all of the businesses in the shopping center remained closed after the first fire, where they nevertheless remained as businesses through the date of the second fire and the building in which they were located was "a building . . . used" in carrying on a business on the date of the second fire. State v. Langley, 64 N.C. App. 674, 308 S.E.2d 445 (1983).

Search by Firemen Without Warrant Reasonable While Present at Fire. — While firemen are present at a fire and engaged in any continuing activity to bring under or control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant and without regard to how or why any accelerants may have been placed or stored on the premises. The fruits of such a search are admissible in evidence against any person charged with an unlawful burning of or upon the premises. State v. Langley, 64 N.C. App. 674, 308 S.E.2d 445 (1983).

§ 14-65. Fraudulently setting fire to dwelling houses.

CASE NOTES

Cited in State v. Knight, 65 N.C. App. 595, 310 S.E.2d 70 (1983).

§ 14-66. Burning of personal property.

CASE NOTES

Search by Firemen Without Warrant Reasonable While Present at Fire. — While firemen are present at a fire and engaged in any continuing activity to bring under or control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant and without regard to how or why any accelerants may have been placed or stored on the premises. The fruits of such a search are admissible in evidence against any person charged with an unlawful burning of or upon the premises. State v. Langley, 64 N.C. App. 674, 308 S.E.2d 445 (1983).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-71. Receiving stolen goods.

CASE NOTES

I. GENERAL CONSIDERATION.

Possession of stolen goods is a statutory crime created by the legislature and is of recent vintage. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983).

Purpose. — The possession statutes were passed to provide protection for society in those instances where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving stolen property. State v. Taylor, 64 N.C. 165, 307 S.E.2d 173 (1983).

§ 14-71.1. Possessing stolen goods.

CASE NOTES

Possession of stolen goods is a statutory crime created by the legislature and is of recent vintage. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983).

Legislative Intent. —

In accord with 2nd paragraph in 1983 Cum. Supp. See State v. Taylor, 64 N.C. 165, 307 S.E.2d 173 (1983).

This section was designed to extend society's protection against theft by allowing prosecution where the State could not prove who committed the larceny and could not prove the elements of receiving stolen goods. However, this does not mean that where the evidence established who committed the larceny, the defendant could not be charged with possession. State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983).

Legislature Did Not Intend Punishment for Larceny and Possession of Same Property. — The legislature did not intend that a defendant be punished for both larceny and possession of the same property. The same logic compels the holding that a defendant may not be punished for both accessory before the fact of larceny and possession. State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983).

Essential elements of misdemeanor possession of stolen goods are (1) possession of personal property, (2) which has been stolen, (3) the possessor knowing or having reasonable grounds to believe the property to have been

stolen, and (4) the possessor acting with a dishonest purpose. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983).

Possession of stolen goods is not a lesser included offense of receiving stolen goods because the elements of receiving and possessing involved separate and distinct acts, the one not present in the other. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983).

Charging of Other Offenses as to Same Property. — Although possession is a charge for the State to fall back on when lacking evidence of other offenses, a defendant may be indicted and tried for larceny, receiving, and possession of the same property as long as he is punished for only one of those offenses. State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding $400.00 in value.

CASE NOTES

I. GENERAL CONSIDERATION.

And Conviction May Be of Only One, etc. —

While a defendant may be indicted and tried both for larceny and possession of the same stolen goods, he may not be convicted of both offenses. State v. Williams, 65 N.C. App. 373, 309 S.E.2d 266 (1983).

Applied in State v. Smith, 65 N.C. App. 770, 310 S.E.2d 115 (1984); State v. Murray, — N.C. —, 313 S.E.2d 523 (1984).

Stated in State v. Downing, — N.C. App. —, 311 S.E.2d 702 (1984); State v. Green, — N.C. —, 312 S.E.2d 434 (1984); State v. Greene, — N.C. App. —, 314 S.E.2d 262 (1984).

Cited in State v. Reid, — N.C. App. —, 311 S.E.2d 675 (1984); State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

III. DEGREES OF OFFENSES.

B. Offenses Which Are Felonies Regardless of Value of Property.

Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of §§ 14-51, 14-53, 14-54 or 14-57. State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984).

Subsection (c) Applies to Subsections (b)(1) and (2). — The reference in subsection (c) of this section to "the circumstances described in subsection (b)" which raise the possession or receiving of stolen goods to the level of a felony is confined to those circumstances described in subsections (b)(1) and (2). Subsections (b)(3) and (4) refer to larceny, rather than circumstances making possession or receiving of stolen goods a felony. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983).

IV. PRACTICE AND PROCEDURE.

A. Indictment.

Failure to State that Goods Were Stolen. — An indictment charging defendant with felonious possession of stolen goods, which fails to state that the goods were stolen, is not thus fatally defective. State v. Williams, 65 N.C. App. 373, 309 S.E.2d 266 (1983).

B. Evidence.

Retail Price as Proof of Value. — Where a merchant has determined a retail price of merchandise which he is willing to accept as the worth of the item offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss. State v. Williams, 65 N.C. App. 373, 309 S.E.2d 266 (1983).

§ 14-74. Larceny by servants and other employees.

CASE NOTES

Value is Immaterial. —

This section does not require that the value of the stolen property be established. State v. Canipe, 64 N.C. App. 102, 306 S.E.2d 548 (1983).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

Legal Periodicals. —

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

A. In General.

Armed Robbery Defined. — An armed robbery is defined as the nonconsensual taking of the personal property of another in his presence or from his person by endangering or threatening his life with a firearm or other deadly weapon, with the taker knowing that he is not entitled to the property and intending to permanently deprive the owner thereof. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

Guilt of Coconspirator for Murder Committed in Course of Armed Robbery. — When a conspiracy is formed to commit an armed robbery and any one of the conspirators commits a murder in the perpetration or attempted perpetration of the armed robbery, all conspirators actually or constructively present, aiding and abetting the actual perpetrators of the crime of armed robbery are guilty of murder in the first degree. Where one has entered into the perpetration of a felony and has aided or encouraged its commission, he cannot escape criminal liability by withdrawing from the scene. State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983).

Applied in State v. Murray, — N.C. —, 313 S.E.2d 523 (1984); State v. Johnson, — N.C. —, 313 S.E.2d 560 (1984).

Quoted in State v. Moore, 65 N.C. App. 56, 308 S.E.2d 723 (1983).

Stated in State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

Cited in State v. Foster, 63 N.C. App. 507, 305 S.E.2d 219 (1983); State v. Miller, 64 N.C. App. 390, 307 S.E.2d 439 (1983); State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983); Ledford v. Hinton, 563 F. Supp. 785 (W.D.N.C. 1983); State v. Pickett, 65 N.C. App. 617, 309 S.E.2d 711 (1983); State v. Thompson, — N.C. App. —, 312 S.E.2d 212 (1984); State v. Cunningham, — N.C. App. —, 314 S.E.2d 556 (1984).

II. ELEMENTS OF CRIME.

A. In General.

This section requires, etc. —

In accord with 2nd paragraph in original. See State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983); State v. Greene, — N.C. App. —, 314 S.E.2d 262 (1984).

Offense is complete if there is an attempt to take property by use of firearms or other dangerous weapons. Thus, all that is necessary to prove the offense is that an attempt was made to rob by the use of a firearm or other dangerous weapon. State v. Thompson, 64 N.C. App. 485, 307 S.E.2d 838 (1983).

B. Use or Threatened Use of Dangerous Weapons.

The question under this section, etc. —

In determining whether a particular instrument constitutes evidence of use of any firearms or other dangerous weapon, implement or means within the prohibition of this section, the determinative question is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened. State v. Joyner, — N.C. App. —, 312 S.E.2d 681 (1984).

Although lurking outside a place of business with a loaded pistol may be unlawful conduct, it does not constitute the sort of overt act which would clearly show that defendant

attempted to rob that business. State v. Parker, — N.C. App. —, 311 S.E.2d 327 (1984).

Dangerous Character of Weapon, etc. — The purpose of subsection (a) of this section would be frustrated or defeated if the court accepted defendant's contention that in the absence of a firing pin, a rifle is not a firearm under this section. The robbery victim should not have to force such issues of whether the instrument actually possesses a firing pin, whether the instrument is loaded, or whether the instrument is real. State v. Joyner, — N.C. App. —, 312 S.E.2d 681 (1984).

V. EVIDENCE.

Previous Abandoned Plan as Evidence. — In a prosecution for armed robbery, evidence of a plan to rob a shopping mall, which plan was abandoned because of circumstances at the mall unfavorable to the successful execution of the planned crime, was admissible where within minutes the same parties were engaged in a plan which resulted in the armed robbery. The evidence elicited by the defendants concerning their hesitancy to engage in the charged crimes emphasized the relevancy of the evidence of the abandoned plan, which tends to show intent and the existence of the abandoned plan, which tends to show intent and the existence of a plan and design among defendants and their confederates to obtain money by means of a robbery. State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983).

Evidence Insufficient to Show Taking with Intent to Deprive Decedent of Property. — Where the evidence clearly established that defendant and deceased struggled violently in the area where most of decedent's personal property was discovered, and defendant's uncontroverted testimony refuted the conclusion that he forcibly took these items from the decedent with the intent to steal them, the logical inference was that decedent lost these items during the struggle. There was simply no substantial evidence of a taking by defendant with the intent to permanently deprive decedent of the property. Therefore, defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been dismissed. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

VII. PUNISHMENT.

Bodily Injury to Blind Victim as Aggravating Factor. — It was proper to find as a factor in aggravation that the defendant inflicted bodily injury upon his blind victim who was both helpless and defenseless in excess of the minimum amount necessary to prove this offense. The infliction of bodily injury in any amount is not an element of either first-degree burglary or robbery with a firearm. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

CASE NOTES

I. GENERAL CONSIDERATION.

Having access to property differs from possessing property in a fiduciary capacity. Embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner, i.e., in a fiduciary capacity. State v. Keyes, 64 N.C. App. 529, 307 S.E.2d 820 (1983).

Cited in Gillikin v. Whitley, — N.C. App. —, 311 S.E.2d 677 (1984).

III. ELEMENTS OF THE OFFENSE.

Elements Generally. — In accord with 3rd paragraph in original. See State v. Earnest, 64 N.C. App. 162, 306 S.E.2d 560 (1983).

Conversion to own use, etc. — It is not necessary to show that the defendant converted his principal's property to his own use, provided it is shown that he fraudulently or knowingly and willfully misapplied it. State v. Earnest, 64 N.C. App. 162, 306 S.E.2d 560 (1983).

Meaning of Fraudulent Intent. — In accord with 1st paragraph in original. See State v. Earnest, 64 N.C. App. 162, 306 S.E.2d 560 (1983).

Article 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

CASE NOTES

I. GENERAL CONSIDERATION.

The gist of the offense, etc. —

The gist of obtaining property by false pretense is the false representation of a subsisting fact intended to and which does deceive one from whom property is obtained. State v. Linker, 309 N.C. 612, 308 S.E.2d 309 (1983).

Applied in In re Prushinowski, 574 F. Supp. 1439 (E.D.N.C. 1983).

II. ELEMENTS OF THE OFFENSE.

Elements Generally. —

In accord with 1st paragraph in original. See State v. Kilgore, 65 N.C. App. 331, 308 S.E.2d 876 (1983).

The elements of the crime of obtaining property by false pretenses are: (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with the intent to defraud; and (5) that it actually did deceive and defraud the person to whom it was made. In re Prushinowski, 574 F. Supp. 1439 (E.D.N.C. 1983).

A transfer of title is not necessary for the commission of the offense of obtaining property by false pretenses. State v. Walston, — N.C. App. —, 312 S.E.2d 676 (1984).

III. INDICTMENT.

Fatal Variance. — The State must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the State's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the State's proof varies fatally from the indictments. State v. Linker, 309 N.C. 612, 308 S.E.2d 309 (1983).

Article 20.

Frauds.

§ 14-118.5. Theft of cable television service.

(a) Any person, firm or corporation who, after October 1, 1984, knowingly and willfully attaches or maintains an electronic, mechanical or other connection to any cable, wire, decoder, converter, device or equipment of a cable television system or removes, tampers with, modifies or alters any cable, wire, decoder, converter, device or equipment of a cable television system for the purpose of intercepting or receiving any programming or service transmitted by such cable television system which person, firm or corporation is not authorized by the cable television system to receive, is guilty of a misdemeanor punishable by a fine not exceeding five hundred dollars ($500.00), or by imprisonment not exceeding 30 days, or both. Each unauthorized connection, attachment, removal, modification or alteration shall constitute a separate violation.

(b) Any person, firm or corporation who knowingly and willfully, without the authorization of a cable television system, distributes, sells, attempts to sell or possesses for sale in North Carolina any converter, decoder, device, or kit, that is designed to decode or descramble any encoded or scrambled signal transmitted by such cable television system, is guilty of a misdemeanor punishable by a fine not exceeding five hundred dollars ($500.00) or by imprisonment up to six months, or both. The term "encoded or scrambled signal" shall include any signal or transmission that is not intended to produce an

intelligible program or service without the aid of a decoder, descrambler, filter, trap or other electronic or mechanical device.

(c) Any cable television system may institute a civil action to enjoin and restrain any violation of this section, and in addition, such cable television system shall be entitled to civil damages in the following amounts:

(1) For each violation of subsection (a), three hundred dollars ($300.00) or three times the amount of actual damages, if any, sustained by the plaintiff, whichever amount is greater.

(2) For each violation of subsection (b), one thousand dollars ($1,000) or three times the amount of actual damages, if any, sustained by the plaintiff, whichever amount is greater.

(d) It is not a necessary prerequisite to a civil action instituted pursuant to this section that the plaintiff has suffered or will suffer actual damages.

(e) Proof that any equipment, cable, wire, decoder, converter or device of a cable television system was modified, removed, altered, tampered with or connected without the consent of such cable system in violation of this section shall be prima facie evidence that such action was taken knowingly and willfully by the person or persons in whose name the cable system's equipment, cable, wire, decoder, converter or device is installed or the person or persons regularly receiving the benefits of cable services resulting from such unauthorized modification, removal, alteration, tampering or connection.

(f) The receipt, decoding or converting of a signal from the air by the use of a satellite dish or antenna shall not constitute a violation of this section.

(g) Cable television systems may refuse to provide service to anyone who violates subsection (a) of this section whether or not the alleged violator has been prosecuted thereunder. (1977, 2nd Sess., c. 1185, s. 1; 1983 (Reg. Sess., 1984), c. 1088, s. 1.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, rewrote this section.

Article 21.

Forgery.

§ 14-119. Forgery of notes, checks, and other securities.

CASE NOTES

Cited in State v. Martin, — N.C. App. —, 313 S.E.2d 15 (1984).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

CASE NOTES

Cited in State v. Martin, — N.C. App. —, 313 S.E.2d 15 (1984).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-127. Willful and wanton injury to real property.

CASE NOTES

Stated in In re Mash, 63 N.C. App. 130, 303 S.E.2d 660 (1983).

ARTICLE 23.

Trespasses to Personal Property.

§ 14-160. Willful and wanton injury to personal property; punishments.

CASE NOTES

Stated in In re Mash, 63 N.C. App. 130, 303 S.E.2d 660 (1983).

Cited in State v. Watson, — N.C. App. —, 311 S.E.2d 381 (1984).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

CASE NOTES

Applied in State v. Warren, 309 N.C. 224, 306 S.E.2d 446 (1983).

§ 14-202.1. Taking indecent liberties with children.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

Cited in State v. Byrd, — N.C. App. —, 312 S.E.2d 528 (1984).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. Punishment for perjury.

CASE NOTES

Applied in Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

§ 14-214. False statement to procure benefit of insurance policy or certificate.

CASE NOTES

Cited in State v. Knight, 65 N.C. App. 595, 310 S.E.2d 70 (1983).

ARTICLE 29.

Bribery.

§ 14-217. Bribery of officials.

(a) If any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, which lay within the scope of his official authority and was connected with the discharge of his official and legal duties, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be punished as a Class I felon.

(b) Indictments issued under these provisions shall specify:

(1) The thing of value or personal advantage sought to be obtained; and

(2) The specific act or omission sought to be obtained; and

(3) That the act or omission sought to be obtained lay within the scope of the defendant's official authority and was connected with the discharge of his official and legal duties.

(c) A person commits the offense of conspiracy to commit bribery as defined in subsection (a) when:

(1) He or she agrees with one or more persons to commit bribery as defined in subsection (a); and
(2) He or she and at least one other person intend at the time of the agreement that it be carried out; and
(3) He or she commits at least one overt act to carry out an object of the conspiracy.

A person cannot be convicted of conspiracy to commit bribery as defined in subsection (a) unless all elements of this section are present and are alleged in the bill of indictment including a specific statement setting forth the overt act committed. (1868-9, c. 176, s. 2; Code, s. 991; Rev., s. 3568; C. S., s. 4372; 1979, c. 760, s. 5; 1983 (Reg. Sess., 1984), c. 1050, s. 1.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, designated the first paragraph as subsection (a), inserted "which lay within the scope of his official authority and was connected with the discharge of his official and legal duties" near the middle of subsection (a), and added subsections (b) and (c).

§ 14-220. Bribery of jurors.

CASE NOTES

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Article 30.

Obstructing Justice.

§ 14-221. Breaking or entering jails with intent to injure prisoners.

CASE NOTES

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-221.1. Altering, destroying, or stealing evidence of criminal conduct.

CASE NOTES

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-223. Resisting officers.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-225.1. Picketing or parading.

CASE NOTES

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-225.2. Harassment of and communication with jurors.

CASE NOTES

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-226. Intimidating or interfering with witnesses.

CASE NOTES

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

ARTICLE 31.

Misconduct in Public Office.

§ 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

OPINIONS OF ATTORNEY GENERAL

Trustees of New Hanover Memorial Hospital, Inc., are subject to the provisions of this section. See opinion of Attorney General to Mr. A. Dumay Gorham, Jr., Attorney for New Hanover Memorial Hospital, Inc., 52 N.C.A.G. 49 (1982).

A trustee's ownership of stock in a company which does business with the hospital violates this section. See opinion of Attorney General to Mr. A. Dumay Gorham, Jr., Attorney for New Hanover Memorial Hospital, Inc., 52 N.C.A.G. 49 (1982).

Telephone Membership Corporation President. — A conflict of interest under this section would not arise from the President of the Board of Directors of a telephone membership corporation serving on the Board of the Rural Electrification Authority. See opinion of Attorney General to Mr. Aaron A. Hathcock, Administrator, Rural Electrification Authority, 52 N.C.A.G. 107 (1983).

Current Division of Mental Health, Mental Retardation and Substance Abuse Services employees can also serve as members of the Commission of Mental Health, Mental Retardation and Substance Abuse Services. See opinion of Attorney General to Ms. Sarah T. Morrow, M.D., M.P.H., Secretary, Department of Human Resources, 52 N.C.A.G. 102 (1983).

§ 14-250. Publicly owned vehicle to be marked.

It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement that such car belongs to the State or to some county, or institution or agency of the State. Provided, however, that no automobile used by any county officer or county official for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking motor vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof, above the license number, the words "State Owned" and that such vehicles have affixed to the front thereof a plate with the statement "State Owned." Provided, further, that in lieu of the above method of marking vehicles owned by any county, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the seal of such county. Provided, further, that in lieu of the above method of marking vehicles owned by the State and permanently assigned to members of the Council of State, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof the license number assigned to the appropriate member of the Council of State pursuant to G.S. 20-81(4); a member of the Council of State shall not be assessed any registration fee if he elects to have a state-owned motor vehicle assigned to him designated by his official plate number.

The General Assembly may authorize exemptions from the provisions of this section for each fiscal year. Each agency shall submit requests for private tags to the Division of Motor Fleet Management of the Department of Administration. The Division shall report the requests to the Appropriations Committees of the General Assembly by June 1. When the General Assembly is not in session, the Division may grant requests for additional exemptions in an exemption category authorized for that period by the General Assembly, not to exceed five percent (5%) of the total number of exemptions authorized for that category. The Division shall report a request for an additional exemption and the Division's proposed action on it to the Joint Legislative Commission on Governmental Operations and to the Advisory Budget Commission before making a final decision on the request. The Division may not consider a request for an additional exemption for a purpose for which a request was previously made to but not granted by the General Assembly. Additional exemptions granted by the Division expire at the end of the fiscal year in which they are granted or when the General Assembly acts on exemptions for the next fiscal year, whichever is sooner. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866; 1957, c. 1249; 1961, c. 1195; 1965, c. 1186; 1971, c. 3; 1981 (Reg. Sess., 1982), c. 1282, ss. 59, 60; 1983 (Reg. Sess., 1984), c. 1034, s. 120).

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote the last four sentences of the second paragraph.

ARTICLE 32.

Misconduct in Private Office.

§ 14-254. Malfeasance of corporation officers and agents.

CASE NOTES

Applied in State v. Fletcher, — N.C. App. —, 310 S.E.2d 787 (1984).

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-258.2. Possession of dangerous weapon in prison.

CASE NOTES

Cited in State v. Phillips, — N.C. App. —, 314 S.E.2d 6 (1984).

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

CASE NOTES

Cited in State v. Moose, — N.C. —, 313 S.E.2d 507 (1984).

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

§ 14-289. Advertising lotteries.

CASE NOTES

Constitutionality. — See State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983).

§ 14-290. Dealing in lotteries.

CASE NOTES

Constitutionality. — See State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983).

Part 2. Bingo and Raffles.

§ 14-309.5. Bingo.

It is lawful for an exempt organization to conduct bingo games in accordance with the provisions of this Part. Any licensed exempt organization who conducts a bingo game in violation of any provision of this Part shall be guilty of a misdemeanor under G.S. 14-292 and shall be punished in accordance with G.S. 14-3. Upon conviction such person shall not conduct a bingo game for a period of one year. It is lawful to participate in a bingo game conducted pursuant to this Part. It shall be a Class H felony for any person: (i) to operate a bingo game without a license; (ii) to operate a bingo game while license is revoked or suspended; (iii) to willfully misuse or misapply any moneys received in connection with any bingo game; or (iv) to contract with or provide consulting services to any licensee. It shall not constitute a violation of any State law to advertise a bingo game conducted in accordance with this Part. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 1-4.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted the references to raffles in this section.

§ 14-309.6. Definitions.

For purposes of this Part, the term:

(1) "Exempt organization" means an organization that has been in continuous existence in the county of operation of the bingo game for at least one year and that is exempt from taxation under section 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), 501(c)(19), or 501(d) of the Internal Revenue Code and is exempt under similar provisions of the General Statutes as a bona fide nonprofit charitable, civic, religious,

fraternal, patriotic or veterans' organization or as a nonprofit volunteer fire department, or as a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association. (If the organization has local branches or chapters, the term "exempt organization" means the local branch or chapter operating the bingo game);

(3) Repealed by Session Laws 1983 (Regular Session 1984), c. 1107, s. 5.

(4) "Local law-enforcement agency" means for any bingo game conducted outside the corporate limits of a municipality or inside the corporate limits of a municipality having no municipal police force:

a. The county police force; or

b. The county sheriff's office in a county with no county police force;

(5) "Local law-enforcement agency" means the municipal police for any bingo game conducted within the corporate limits of a municipality having a police force;

(1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted the references to raffles in subdivisions (1), (4) and (5), and deleted subdivision (3), defining the term "Raffle."

§ 14-309.7. Licensing procedure.

(a) Any exempt organization desiring to obtain a license to operate bingo games shall make application to the Department of Revenue on forms prescribed by the Department. Such license shall expire one year after the granting of the license. This license may be renewed from year to year. A copy of the application and license shall be furnished to the local law-enforcement agency in the county or municipality in which the licensee intends to operate before bingo is conducted by the licensee.

(b) Each application and renewal application shall contain the following information:

(1) The name and address of the applicant and if the applicant is a corporation, association or other similar legal entity, the name and home address of each of the officers of the organization as well as the name and address of the directors, or other persons similarly situated, of the organization.

(2) The name and home address of each of the members of the special committee.

(3) A copy of the application for recognition of exemptions and a determination letter from the Internal Revenue Service and the Department of Revenue that indicates that the organization is an exempt organization and stating the section under which that exemption is granted; except that if the organization is a State or local branch, lodge, post, or chapter of a national organization, a copy of the determination letter of the national organization satisfies this requirement.

(4) The location at which the applicant will conduct the bingo games. If the premises are leased, a copy of the lease or rental agreement.

(c) In order for an exempt organization to have a member familiar with the operation of bingo present on the premises at all times when bingo is being played and for this member to be responsible for the receiving, reporting and depositing of all revenues received, the exempt organization may pay one member for conducting a bingo game. Such pay shall be on an hourly basis only for the time bingo is actually being played and shall not exceed one and one-half times the existing minimum wage in North Carolina. The member

paid under this provision shall be a member in good standing of the exempt organization for at least one year and shall not be the lessor or an employee or agent of the lessor. No other person may be compensated for conducting a bingo game from funds derived from any activities occurring in, or simultaneously with, the playing of bingo, including funds derived from concessions. An exempt organization shall not contract with any person for the purpose of conducting a bingo game. Except as provided in subsection (e) of this section, an exempt organization may hold a bingo game only in or on property owned (either legally or equitably and the buildings must be of a permanent nature with approved plumbing for bathrooms and not movable or of a temporary nature such as a tent or lean-to) or leased by the organization from the owner or bona fide property management agent (no subleasing is permitted) at a total monthly rental in an amount not to exceed one and one-quarter percent (1¼%) of the total assessed ad valorem tax value of the portion of the building actually used for the bingo games and the land value on which the building is located (not to exceed two acres) for all activities conducted therein including the playing of bingo for a period of not less than one year and actually occupied and used by that organization on a regular basis for purposes other than bingo for at least six months before the game; and all equipment used by the exempt organization in conducting the bingo game must be owned by the organization. Unless the exempt organization leases the property in accordance with this subsection, an exempt organization may conduct a bingo game only in or on property that is exempt from property taxes levied under Subchapter II of Chapter 105 of the General Statutes, or that is classified and not subject to any property taxes levied under Subchapter II of Chapter 105 of the General Statutes. It shall be unlawful for any person to operate beach bingo games at a location which is being used by any licensed exempt organization for the purpose of conducting bingo games.

(d) Conduct of a bingo game under this Part on such property shall not operate to defeat an exemption or classification under Subchapter II of Chapter 105 of the General Statutes.

(1983, c. 896, s. 3; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 4, 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted the references to raffles in subsections (a), (b), (c) and (d) of this section.

§ 14-309.8. Limit on sessions.

The number of sessions of bingo conducted or sponsored by an exempt organization shall be limited to two sessions per week and such sessions must not exceed a period of five hours each per session. No two sessions of bingo shall be held within a 48-hour period of time. No more than two sessions of bingo shall be operated or conducted in any one building, hall or structure during any one calendar week and if two sessions are held, they must be held by the same exempt organization. This section shall not apply to bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes. (1983, c. 896, s. 3; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1107, ss. 6, 7.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted the former next-to-last sentence, which read "Raffles shall be limited to one per month per organization per county," and deleted "or raffles" following "bingo games" in the last sentence.

§ 14-309.9. Bingo prizes.

(b) Repealed by Session Laws 1983 (Regular Session 1984), c. 1107, s. 8.

(c) This section shall not apply to bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 6, 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted subsection (b), relating to raffles, and deleted "or raffles" following "bingo games" in subsection (c).

§ 14-309.10. Operation of bingo.

The operation of bingo games shall be the direct responsibility of, and controlled by, a special committee selected by the governing body of the exempt organization in the manner provided by the rules of the exempt organization. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 9.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted "raffles or" preceding "bingo games" near the beginning of the section.

§ 14-309.11. Accounting and use of proceeds.

(a) All funds received in connection with a bingo game shall be placed in a separate bank account. No funds may be disbursed from this account except the exempt organization may expend proceeds for prizes, advertising, utilities, and the purchase of supplies and equipment used [in conducting the raffle and] in playing bingo, taxes and license fees related to bingo and the payment of compensation as authorized by G.S. 14-309.7(c) and for the purposes set forth below for the remaining proceeds. Such payments shall be made by consecutively numbered checks. Any proceeds available in the account after payment of the above expenses shall inure to the exempt organization to be used for religious, charitable, civic, scientific, testing, public safety, literary, or educational purposes or for purchasing, constructing, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the general public from time to time, or to foster amateur sports competition, or for the prevention of cruelty to children or animals, provided that no proceeds shall be used or expended for social functions for the members of the exempt organization.

(b) An audit of the account required by subsection (a) of this section shall be prepared annually for the period of January 1 through December 31 or otherwise as directed by the Department of Revenue and shall be filed with the Department of Revenue and the local law-enforcement agency at a time directed by the Department of Revenue. The audit shall be prepared on a form approved by the Department of Revenue and shall include the following information:

(1) The number of bingo games conducted or sponsored by the exempt organization;
(2) The location and date at which each bingo game was conducted and the prize awarded;
(3) The gross receipts of each bingo game;
(4) The cost or amount of any prize given at each bingo game;
(5) The amount paid in prizes at each session;

(6) The net return to the exempt organization; and
(7) The disbursements from the separate account and the purpose of those disbursements, including the date of each transaction and the name and address of each payee.

(1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 3, 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — The phrase "in conducting the raffle and" which appears in the second sentence of subsection (a) was not changed by Session Laws 1983 (Reg. Sess., 1984), c. 1107, which deleted the other references to raffles from this section. However, it would appear that the retention of this phrase may have been inadvertent.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted "raffle or" preceding "bingo game" in the first sentence of subsection (a) and in subdivisions (b)(2), (b)(3) and (b)(4), deleted "raffles and" preceding "bingo and the payment" in the second sentence of subsection (a), and deleted "raffles or" preceding "bingo games" in subdivision (b)(1).

§ 14-309.12. Violation is gambling.

A bingo game conducted otherwise than in accordance with the provisions of this Part is "gambling" within the meaning of G.S. 19-1 et seq., and proceedings against such bingo game may be instituted as provided for in Chapter 19 of the General Statutes. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 2.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted two references to raffles in this section.

§ 14-309.13. Public sessions.

Any exempt organization operating a bingo game which is open to persons other than members of the exempt organization, their spouses, and their children shall make such bingo game open to the general public. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 4.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted two references to raffles in this section.

§ 14-309.14. Beach bingo.

Nothing in this Article shall apply to "beach bingo" games. G.S. 18B-308 shall apply to such games. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 10.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted "nor shall it apply to any raffle held in conjunction with a convention or other meeting open only to members of the exempt organization, their spouses, and their children" at the end of the first sentence.

§ 14-309.15. Raffles.

(a) It is lawful for any nonprofit organization or association, recognized by the Department of Revenue as tax-exempt pursuant to G.S. 105-130.11(a), to conduct raffles in accordance with this section. Any person who conducts a raffle in violation of any provision of this section shall be guilty of a misde-

meanor under G.S. 14-292 and shall be punished in accordance with G.S. 14-3. Upon conviction that person shall not conduct a raffle for a period of one year. It is lawful to participate in a raffle conducted pursuant to this section. It shall not constitute a violation of State law to advertise a raffle conducted in accordance with this section. A raffle conducted pursuant to this section is not "gambling".

(b) For purposes of this section "raffle" means a game in which the prize is won by random drawing of the name or number of one or more persons purchasing chances.

(c) Raffles shall be limited to two per nonprofit organization per year.

(d) The maximum cash prize that may be offered or paid for any one raffle is one thousand dollars ($1,000) and if merchandise is used as a prize, and it is not redeemable for cash, the maximum fair market value of that prize may be twenty-five thousand dollars ($25,000). No real property may be offered as a prize in a raffle.

(e) Raffles shall not be conducted in conjunction with bingo.

(f) As used in this subsection, "net proceeds of a raffle" means the receipts less the cost of prizes awarded. No less than ninety percent (90%) of the net proceeds of a raffle shall be used by the nonprofit organization or association for charitable, religious, educational, civic, or other nonprofit purposes. None of the net proceeds of the raffle may be used to pay any person to conduct the raffle, or to rent a building where the tickets are received or sold or the drawing is conducted. (1983 (Reg. Sess., 1984), c. 1107, s. 11.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1107, s. 12, makes this section effective July 6, 1984.

ARTICLE 39.

Protection of Minors.

§ 14-316.1. Contributing to delinquency and neglect by parents and others.

Legal Periodicals. —

For note discussing a new means to combat child abuse in light of State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), see 5 Camp. L. Rev. 415 (1983).

§ 14-318.2. Child abuse a general misdemeanor.

Legal Periodicals. —

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note discussing a new means to combat child abuse in light of State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), see 5 Camp. L. Rev. 415 (1983).

CASE NOTES

By the enactment of this section, etc.

In accord with 2nd paragraph in original. See State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983).

The word "inflict" means to lay on or impose, and is aptly used in connection with punishment. Thus, to violate this section, an intentional, rather than accidental, act causing physical injury is required; but an intent to injure is not required. The phrase "accidental means" relates to unintentional acts. State v. Young, — N.C. App. —, 312 S.E.2d 665 (1984).

Where child is injured because defendant intentionally put her in hot water, if one of defendant's purposes in doing so was to punish the child, defendant would be guilty of misdemeanor child abuse, even though she may not have intended to cause an injury. State v. Young, — N.C. App. —, 312 S.E.2d 665 (1984).

A violation of this section proximately resulting in death would support a conviction of involuntary manslaughter. State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983).

The "battered child syndrome" is a medicolegal term which describes the diagnosis of a medical expert based on scientific studies that when a child suffers certain types of continuing injuries that the injuries were not caused by accidental means. Upon such a finding, it is logical to presume that someone "caring" for the child was responsible for the injuries. State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983).

State's Burden of Proof. —

An essential element of proof under this section is a showing that the injuries suffered by the child were inflicted by other than accidental means. State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983).

Where there is no medical testimony indicating that deceased child was an example of the "battered child syndrome" the State does not have the benefit of the permissible inferences arising from testimony that a child is an example of the "battered child syndrome." Thus, the prosecution must rely upon other evidence to prove a violation of this section and to support a conviction of involuntary manslaughter. State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983).

For landmark case in North Carolina on the "battered child syndrome," see State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983).

§ 14-318.4. Child abuse a felony.

Legal Periodicals. —

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For note discussing a new means to combat child abuse in light of State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), see 5 Camp. L. Rev. 415 (1983).

CASE NOTES

Applied in State v. Young, — N.C. App. —, 312 S.E.2d 665 (1984).

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment and failure to support spouse and children.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Caudill, — N.C. App. —, 314 S.E.2d 592 (1984).

Stated in State, New Bern Child Support Agency ex rel. Lewis v. Lewis, 63 N.C. App. 98, 303 S.E.2d 627 (1983).

ARTICLE 45.

Regulation of Employer and Employee.

§ 14-353. Influencing agents and servants in violating duties owed employers.

CASE NOTES

Cited in Rose's Stores, Inc. v. Padgett, 62 N.C. App. 404, 303 S.E.2d 344 (1983).

ARTICLE 52.

Miscellaneous Police Regulations.

§ 14-399. Littering.

Local Modification. — Rutherford County: 1983 (Reg. Sess., 1984), c. 977.

§ 14-401.12. Soliciting charitable contributions by telephone.

CASE NOTES

Section Is Unconstitutional. — This section contravenes the First and Fourteenth Amendments to the Constitution of the United States and is therefore void and unenforceable. Optimist Club v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982).

ARTICLE 52A.

Sale of Weapons in Certain Counties.

§ 14-402. Sale of certain weapons without permit forbidden.

Certain Counties Exempted from Application of Article. —

Session Laws 1983 (Reg. Sess., 1984), chapter 962, deletes Lincoln from the list of counties exempted from application of the 1959 amendments to this Article by Session Laws 1959, c. 1073, s. 4.

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

CASE NOTES

The General Assembly did not intend a preclusion of consolidation by requiring a separate bill of indictment under this section. Had the General Assembly also intended to preclude consolidation of the related offenses for trial by the requirement of a separate bill of indictment, it would have so stated. State v. Hardy, — N.C. App. —, 312 S.E.2d 699 (1984).

Subsection (c) of this section is clear and unambiguous. It is silent as to the question of consolidation and it simply requires a separate indictment. The mere fact of a requirement of separate indictments constitutes no bar, in and of itself, to consolidation. State v. Hardy, — N.C. App. —, 312 S.E.2d 699 (1984).

Chapter 15.

Criminal Procedure.

ARTICLE 1.

General Provisions.

§ 15-1. Statute of limitations for misdemeanors.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Applied in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Cited in State v. Hinson, — N.C. —, 311 S.E.2d 256 (1984).

§ 15-144.1. Essentials of bill for rape.

CASE NOTES

Applied in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Stated in State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984).

§ 15-144.2. Essentials of bill for sex offense.

CASE NOTES

Indictment under Subsection (b) Need Not Specify Sexual Act. — An indictment drafted pursuant to subsection (b) of this section without specifying which sexual act was committed is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such accusation. Should a defendant require additional information on the nature of the specific sexual act with which he stands charged, he may move for a bill of particulars. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

§ 15-155. Defects which do not vitiate.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984).

II. TIME OF OFFENSE.

Variance between Time, etc. — The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. State v. Price, — N.C. —, 313 S.E.2d 556 (1984).

When time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed. State v. Price, — N.C. —, 313 S.E.2d 556 (1984).

Article 17.

Trial in Superior Court.

§ 15-167. Extension of session of court by trial judge.

CASE NOTES

Cited in State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

§ 15-170. Conviction for a less degree or an attempt.

Legal Periodicals. — For comment on the defense of legal impossibility in light of State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982), see 19 Wake Forest L. Rev. 605 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Offense Not Included If it Contains Element Not in Other Crime. — A crime is not a lesser included offense of another crime if the former contains any element that the latter does not. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Applied in State v. Robinson, — N.C. —, 313 S.E.2d 571 (1984).

§ 15-173. Demurrer to the evidence.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Article 19.

Execution.

§ 15-194. Time for execution.

CASE NOTES

Cited in State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984).

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

Article 73.

Criminal Jury Trial in Superior Court.

Sec.

15A-1223. Disqualification of judge.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 82.

Probation.

15A-1343. Conditions of probation.

15A-1344.1. (For expiration date see note) Procedure to insure payment of child support.

Article 85.

Parole.

Sec.

15A-1371. Parole eligibility, consideration, and refusal.

Article 85A.

Parole of Certain Convicted Felons.

15A-1380.2. Reentry parole of felons.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 91.

Appeal to Appellate Division.

15A-1446. Requisites for preserving the right to appellate review.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

Legal Periodicals. —

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

There are no cases which have construed subdivision (4a), which governs "entry of judgment" in criminal cases. However, § 1A-1, Rule 58 is sufficiently analogous to provide guidance in the area. State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

Subdivision (4a) Should Apply to Judgments and Orders. — Although subdivision (4a) of this section does not specifically apply to orders, the Supreme Court thinks the same rule should apply to judgments and orders. State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

Many rights relating to the appeals process are "keyed" to the time of "entry of judgment," it is therefore imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered. State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent".

CASE NOTES

Stated in State v. Williams, — N.C. App. —, 313 S.E.2d 236 (1984).

§ 15A-223. Permissible scope of consent search and seizure.

CASE NOTES

Applied in State v. Williams, — N.C. App. —, 313 S.E.2d 236 (1984).

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

CASE NOTES

II. SEARCH INCIDENT TO ARREST OR OTHER DETENTION.

State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983).

Property Which May Be Taken, etc. — In accord with 1st paragraph in original. See

ARTICLE 11.

Search Warrants.

§ 15A-243. Who may issue a search warrant.

CASE NOTES

Applied in State v. Holloway, — N.C. App. —, 311 S.E.2d 707 (1984).

§ 15A-244. Contents of the application for a search warrant.

CASE NOTES

I. GENERAL CONSIDERATION.

Language of Application. —
The warrant should describe with particularity the place to be searched since general warrants are repugnant to the Fourth Amendment, which has been applied to the states through incorporation in the Fourteenth Amendment. State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

II. PROBABLE CAUSE.

A search warrant can only be issued upon a determination of probable cause. The person who makes that determination must be a neutral and detached magistrate instead of the officer engaged in the often competitive enterprise of ferreting out crime. State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

Probable Cause Determined, etc.
Observations of fellow officers engaged in the same investigation are plainly a reliable basis for a warrant applied for by one of their number. State v. Horner, — N.C. —, 311 S.E.2d 281 (1984).

Probable cause does not deal in certainties, etc. —
Probable cause is concerned with probabilities, the practical considerations of everyday life upon which reasonable and prudent men act. State v. Horner, — N.C. —, 311 S.E.2d 281 (1984).

Probable cause may be based upon hearsay evidence. The officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Horner, — N.C. —, 311 S.E.2d 281 (1984).

III. AFFIDAVITS AND INFORMANTS.

What Tip Must Show. —
When the application for a search warrant is based on an informant's tip, however, it must meet the two-prong test developed by the Supreme Court in Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). First, the affidavit must set forth sufficient underlying circumstances to permit a neutral and detached magistrate to understand how the informant reached his conclusion. Second, the affidavit must establish the reliability of the informant. This can be done by showing prior use and reliability of the informant, a declaration against his penal interest, clear and precise details in the tip indicating personal observation and knowledge of the location of the evidence, or membership of the informant in a reliable group like the clergy. State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

III. AFFIDAVITS.

Sufficiency of Affidavit. —
In accord with 2nd paragraph in original. See State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Purely Conclusory, etc. —
In accord with 1st paragraph in original. See State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

§ 15A-252. Service of a search warrant.

CASE NOTES

Applied in State v. Copeland, 64 N.C. App. 612, 307 S.E.2d 574 (1983).

ARTICLE 14.

Nontestimonial Identification.

§ 15A-281. Nontestimonial identification order at request of defendant.

CASE NOTES

Stated in State v. Abdullah, — N.C. App. —, 310 S.E.2d 413 (1984).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-305. Order for arrest.

CASE NOTES

Applied in State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983).

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

Legal Periodicals. — For note discussing the exclusionary rule in probation revocation hearings in light of State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982), see 19 Wake Forest L. Rev. 845 (1983).

CASE NOTES

III. ARREST WITHOUT WARRANT.

A. In General.

To establish probable cause, etc. — In accord with 1st paragraph in original. See State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983).

Arresting Officer May Act on Information Supplied by Others. — It is elemental that an arresting officer may act on information supplied by others relating that a felony has been committed and describing the suspected felon. Although the arresting officers may not have had personal knowledge of all the facts justifying arrest, probable cause can be imputed from one officer to others acting at his request. State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983).

§ 15A-404. Detention of offenders by private persons.

CASE NOTES

Instruction on Reasonableness. — Defendant was entitled to requested instruction concerning the reasonableness of his armed detention of homicide victim only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated in subsection (b) of this section had been committed; (2) defendant was trying to "detain" the offender until the police arrived; and (3) the manner of detention was reasonable under the circumstances. State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983).

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

CASE NOTES

Applied in State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

ARTICLE 26.

Bail.

§ 15A-531. Definitions.

CASE NOTES

Proper for Sentence to Reflect that Defendant on Pretrial Release When Crime Convicted. — Whether or not one on pretrial release on another felony charge is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The Legislature may constitutionally require that it be considered. One demonstrates disdain for the law by commiting an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance. State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983).

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-534. Procedure for determining conditions of pretrial release.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-536. Release after conviction in the superior court.

CASE NOTES

Grant or Denial of Bail, etc. — The terms of defendant's release pending appeal are within the discretion of the court. State v. Crabtree, — N.C. App. —, 312 S.E.2d 219 (1984).

§ 15A-544. Forfeiture.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Moore, 64 N.C. App. 516, 307 S.E.2d 834 (1983).

II. RELIEF FROM FORFEITURE.

Under subsection (e), etc. — Since subsection (e) of this section says "may" remit, the decision to do so or not is a discretionary one. In order to exercise judicial discretion in a manner favorable to a surety, the judge must determine in his discretion that justice requires remission. State v. Horne, — N.C. App. —, 315 S.E.2d 321 (1984).

Court's Discretion Not Abused. — Where the facts conclusively showed that defendant was not incarcerated, and there was no evidence of personal sickness or death, the trial court did not abuse its discretion in refusing to recognize the sureties' defense of excusable absence because of defendant's inability to attend court. State v. Horne, — N.C. App. —, 315 S.E.2d 321 (1984).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court.

CASE NOTES

Applied in State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

§ 15A-603. Assuring defendant's right to counsel.

CASE NOTES

Section 7A-457 presupposes that a defendant has been informed of his rights and given an opportunity to act on the information as provided in this section. This involves a determination of defendant's indigency and entitlement to court appointed counsel. However, whether or not a defendant is indigent, any waiver must be in accordance with § 7A-457, notwithstanding the limiting language thereof. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

A defendant who appears without counsel at his arraignment must be properly informed of his rights in the manner required by this section. Where the defendant nevertheless wishes to waive counsel, the court must find that this section has been complied with before a valid waiver can be made. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

§ 15A-606. Demand or waiver of probable-cause hearing.

CASE NOTES

Cited in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

ARTICLE 30.

Probable-Cause Hearing.

§ 15A-611. Probable-cause hearing procedure.

CASE NOTES

Cited in State v. Byrd, — N.C. App. —, 312 S.E.2d 528 (1984).

§ 15A-612. Disposition of charge on probable-cause hearing.

CASE NOTES

When a finding, etc. —

Under § 15A-701(a1)(3), when a charge is dismissed pursuant to this section as a result of a finding of no probable cause, the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the items listed in § 15A-701(a1)(3) ("arrested, served with criminal process, waived an indictment, or was indicted") relating to the new charge rather than the original charge. Otherwise, the clearly expressed intent of the Legislature, that no finding made by a judge in a probable cause hearing will preclude the State from instituting a subsequent prosecution for the same offense, would be defeated. State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983).

Applied in State v. Gross, — N.C. App. —, 311 S.E.2d 41 (1984).

ARTICLE 31.

The Grand Jury and Its Proceedings.

§ 15A-626. Who may call witnesses before grand jury; no right to appear without consent of prosecutor or judge.

CASE NOTES

Purpose of subsection (b) of this section is to provide that the clerk only call as witnesses persons whose names appear on the indictment. State v. McLain, 64 N.C. App. 571, 307 S.E.2d 769 (1983).

The logical purpose of subsection (b) of this section is not to insure that all witnesses must be called by the clerk. State v. McLain, 64 N.C. App. 571, 307 S.E.2d 769 (1983).

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-644. Form and content of indictment, information or presentment.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions.

CASE NOTES

I. GENERAL CONSIDERATION.

Legislative Intent. — It must be assumed that the legislature in enacting the Speedy Trial Act, which includes this section, was aware of the preexisting § 15A-927(c)(2). It must also be assumed that the legislature did not intend to do a vain act. Therefore, it is the court's belief that the provision "right to a speedy trial" found in § 15A-927 refers to the defendant's constitutional right to a speedy trial, not his statutory right. This interpretation allows a harmonious existence between these statutes, and returns discretion to trial courts. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

The basic purpose of the Speedy Trial Act is to provide for the efficient administration of justice, which, according to the legislature, is best effectuated through a prompt determination of a criminal defendant's guilt or innocence. The act's delineation of specific time limits and exclusions serves as a guideline for processing cases, and thus provides a technical defense for criminal defendants. This statute is quite distinguishable from a defendant's Sixth Amendment fundamental right to a speedy trial under the United States Constitution, and in no way should it be interpreted as a bar to this constitutional right. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

Legislature intended the phrase "whichever occurs last" to have its ordinary meaning and to indicate that, of the triggering events listed in the statute, that event occurring last in fact will trigger the running of the 120-day period within which the defendant must be brought to trial. State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983).

When 120-Day Period Triggered. — Under subdivision (a1)(3) of this section, when a charge is dismissed pursuant to § 15A-612 as a result of a finding of no probable cause, the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the listed items ("arrested, served with criminal process, waived an indictment, or was indicted") relating to the new charge rather than the original charge. Otherwise, the clearly expressed intent of the legislature, that no finding made by a judge in a probable cause hearing will preclude the state from instituting a subsequent prosecution for the same offense, would be defeated. State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983).

Postindictment Arrest, Not Indictment, Held to Trigger Time Limit. — Where defendant was indicted and six months later was arrested, the relevant event, for purposes of the 120-day period in subdivisions (a1)(1) and (a1)(3), was his post-indictment arrest, not his indictment. State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983).

Burden on Defendant to Show Prosecutorial Neglect or Willfulness Caused Delay. — The ends of justice afforded by a speedy trial are not best served when speed is placed before thorough and deliberate preparation for trial.

The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Kilgore, 65 N.C. App. 331, 308 S.E.2d 876 (1983).

Applied in State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Herald, 65 N.C. App. 692, 309 S.E.2d 546 (1983); State v. Bean, — N.C. App. —, 310 S.E.2d 421 (1984); State v. Davis, — N.C. App. —, 310 S.E.2d 424 (1984); State v. Gross, — N.C. App. —, 311 S.E.2d 41 (1984); State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984); State v. Lefever, — N.C. App. —, 313 S.E.2d 599 (1984); State v. Jones, — N.C. —, 314 S.E.2d 529 (1984).

III. PERIODS EXCLUDED FROM TIME COMPUTATION.

A. In General.

Time period from calendaring of a case for arraignment to completion of arraignment is properly excluded under subdivision (b)(1) of this section. State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983).

F. Discovery.

A defendant may petition the court to declare a specific time, place and manner for completing discovery. If the defendant pursues this available course of action, then, of course, the statutory time begins to run again upon the court ordered date of compliance. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

Exclusion of discovery time does not force the defendant to anxiously await, at the mercy of the State, the completion of discovery within a reasonable time. The State remains bound not only by requirements of good faith to proceed in a timely manner, but also by the defendant's ability to compel earlier discovery, pursuant to § 15A-909. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

§ 15A-702. Counties with limited court sessions.

CASE NOTES

Applied in State v. Davis, — N.C. App. —, 310 S.E.2d 424 (1984).

§ 15A-703. Sanctions.

CASE NOTES

Applied in State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983); State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983); State v. Davis, — N.C. App. —, 310 S.E.2d 424 (1984); State v. Gross, — N.C. App. —, 311 S.E.2d 41 (1984); State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

Cited in State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984).

§ 15A-704. No bar to claim of denial of speedy trial.

CASE NOTES

The basic purpose of the Speedy Trial Act is to provide for the efficient administration of justice, which, according to the Legislature, is best effectuated through a prompt determination of a criminal defendant's guilt or innocence. The act's delineation of specific time limits and exclusions serves as a guideline for processing cases, and thus provides a technical defense for criminal defendants. This statute is quite distinguishable from a defendant's Sixth Amendment fundamental right to a speedy trial under the United States Constitution, and in no way should it be interpreted as a bar to this constitutional right. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

CASE NOTES

Applied in State v. Davis, — N.C. App. —, 310 S.E.2d 424 (1984).

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-722. Duty of Governor as to fugitives from justice of other states.

CASE NOTES

The necessity for a Governor's warrant is a procedural requirement for proceedings under the Uniform Criminal Extradition Act and is expressly exempted as a procedural right in proceedings under the Interstate Agreement on Detainers (see § 15A-761 Article IV(d)). In re Morris, 563 F. Supp. 1289 (W.D.N.C.), certificate of probable cause denied and dismissed, 718 F.2d 1092 (4th Cir. 1983).

§ 15A-733. Arrest prior to requisition.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-735. Commitment to await requisition; bail.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-736. Bail in certain cases; conditions of bond.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-738. Forfeiture of bail.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-740. Guilt or innocence of accused, when inquired into.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

CASE NOTES

Agreement clearly relates only to those charges which are the basis for the issuance of the detainer. State v. Parr, 65 N.C. App. 415, 308 S.E.2d 881 (1983).

The necessity for a Governor's warrant is a procedural requirement for proceedings under the Uniform Criminal Extradition Act and is expressly exempted as a procedural right in proceedings under Article IV(d) of this section. In re Morris, 563 F. Supp. 1289 (W.D.N.C.), certificate of probable cause denied and dismissed, 718 F.2d 1092 (4th Cir. 1983).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-805. Securing attendance of witnesses confined in institutions within the State.

CASE NOTES

Applied in State v. Jackson, 64 N.C. App. 715, 308 S.E.2d 360 (1983).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-902. Discovery procedure.

CASE NOTES

Applied in State v. Martin, — N.C. App. —, 313 S.E.2d 15 (1984).

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

CASE NOTES

Applied in State v. Robinson, — N.C. —, 313 S.E.2d 571 (1984); State v. Lefever, — N.C. App. —, 313 S.E.2d 599 (1984).

IV. STATE WITNESSES.

Impeachment value in the victim's statements goes to the weight of the victim's identification of the defendant rather than to its admissibility. State v. Jean, — N.C. —, 311 S.E.2d 266 (1984).

§ 15A-904. Disclosure of evidence by the State — Certain reports not subject to disclosure.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Lefever, — N.C. App. —, 313 S.E.2d 599 (1984).

Cited in State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983).

II. STATE WITNESSES.

But subsection (a) does not bar, etc. — Under subsection (a) of this section, the State is not required to give to defendant before trial any statements made by witnesses of the State.

If such evidence is material and favorable to the defendant, the State is required to disclose it to defense counsel at trial. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Impeachment value of victim's statements goes to the weight of the victim's identification of the defendant rather than to its admissibility. State v. Jean, — N.C. —, 311 S.E.2d 266 (1984).

§ 15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.

CASE NOTES

Applied in State v. McMahon, — N.C. App. —, 312 S.E.2d 526 (1984).

§ 15A-909. Regulation of discovery — Time, place, and manner of discovery and inspection.

CASE NOTES

A defendant may petition the court to declare a specific time, place and manner for completing discovery. If the defendant pursues this available course of action, then, of course, the statutory time begins to run again upon the court ordered date of compliance. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

Exclusion of discovery time does not force the defendant to anxiously await, at the mercy of the State, the completion of discovery within a reasonable time. The State remains bound not only by requirements of good faith to proceed in a timely manner, but also by the defendant's ability to compel earlier discovery, pursuant to this section. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

§ 15A-910. Regulation of discovery — Failure to comply.

CASE NOTES

Clarification was the purpose of the 1983 amendment to this section. It thus should not be construed to have changed the law so as to permit a previously prohibited sanction, but rather to have made explicit a previously implicit intent that the sanction of dismissal be among those which could be implemented by other appropriate orders. State v. Adams, — N.C. App. —, 312 S.E.2d 498 (1984).

Particular Remedy, etc. —

The decision to employ remedies available under this section is a matter within the discretion of the trial judge and, absent abuse, is not reviewable on appeal. State v. Martin, — N.C. App. —, 313 S.E.2d 15 (1984).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-922. Use of pleadings in misdemeanor cases generally.

CASE NOTES

Quoted in State v. Caudill, — N.C. App. —, 314 S.E.2d 592 (1984).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

CASE NOTES

The State may prove that an offense charged was committed on some date other than the time named in the indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. State v. Price, — N.C. —, 313 S.E.2d 556 (1984).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. Willis, — N.C. App. —, 313 S.E.2d 173 (1984).

Cited in State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

§ 15A-925. Bill of particulars.

CASE NOTES

Applied in State v. Whitfield, — N.C. —, 313 S.E.2d 790 (1984).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

I. GENERAL CONSIDERATION.

But mere finding of the transactional connection, etc. —

In accord with original. See State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Ruling on Consolidation, etc. —

In accord with 1st paragraph in original. See

State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

The granting of a motion to consolidate is reviewable only for abuse of discretion. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

The question of whether to join the offenses for trial is addressed to the sound discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. State v. Hardy, — N.C. App. —, 312 S.E.2d 699 (1984).

Applied in State v. Bellamy, 64 N.C. App. 454, 308 S.E.2d 88 (1983); State v. Godwin, — N.C. App. —, 314 S.E.2d 265 (1984); State v. Poindexter, — N.C. App. —, 314 S.E.2d 594 (1984).

II. JOINDER OF OFFENSES.

A. In General.

Nature of Offenses, etc. —

In accord with 2nd paragraph in original. See State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Section does not allow joinder merely if the offenses are of the same class of crime. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Joinder Disallowed Where Acts Are of Same Class of Crime, but No Transactional Connection. — This statute, which became effective in 1975, differs from its predecessor in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection among the offenses. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Consolidation Improper as Matter of Law Absent Transactional Connection. — If the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

III. JOINDER OF DEFENDANTS.

A. In General.

For discussion of whether codefendants who are tried jointly should receive joint or separate sentencing trial, see State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

Legislative Intent. — It must be assumed that the legislature in enacting the Speedy Trial Act was aware of the preexisting subdivision (c)(2) of this section. It must also be assumed that the legislature did not intend to do a vain act. Therefore, it is the court's belief that the provision "right to a speedy trial" found in this section, refers to the defendant's constitutional right to a speedy trial, not his statutory right. This interpretation allows a harmonious existence between these statutes, and returns discretion to trial courts. State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

Discretion of Trial Judge. —

The question of whether to join the offenses for trial is addressed to the sound discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. State v. Hardy, — N.C. App. —, 312 S.E.2d 699 (1984).

Review of Exercise, etc. —

In accord with 4th paragraph in original. See State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Test Is Whether Conflict, etc. —

Each case turns on its own facts, and an abuse of discretion may be shown when the defenses of the codefendants are antagonistic, and the conflict in the defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, a defendant would be denied a fair trial. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Applied in State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983); State v. Cantrell, 64 N.C. App. 207, 306 S.E.2d 555 (1983).

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

CASE NOTES

Entry of voluntary dismissal does not violate right to speedy trial. — Under the present system of voluntary dismissals no indictment is left pending. If dismissed charges are later reinstated, defendant at this point would have standing to move for speedy trial relief. State v. Herald, 65 N.C. App. 692, 309 S.E.2d 546 (1983).

Cited in State v. Gross, — N.C. App. —, 311 S.E.2d 41 (1984).

ARTICLE 51.

Arraignment.

§ 15A-941. Arraignment before judge.

CASE NOTES

Purpose of an arraignment, etc. — Should the defendant fail to plead after the prosecutor has read the charges or otherwise fairly summarized them, the court must record the fact, and defendant must be tried as if he had entered a plea of not guilty. State v. Riddle, — N.C. App. —, 310 S.E.2d 396 (1984).

Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. State v. Riddle, — N.C. App. —, 310 S.E.2d 396 (1984).

Where defendant in no way was prejudiced by the lack of formal arraignment he cannot claim reversible error. State v. Riddle, — N.C. App. —, 310 S.E.2d 396 (1984).

§ 15A-945. Waiver of arraignment.

CASE NOTES

Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. State v. Riddle, — N.C. App. —, 310 S.E.2d 396 (1984).

Where defendant in no way was prejudiced by the lack of formal arraignment he cannot claim reversible error. State v. Riddle, — N.C. App. —, 310 S.E.2d 396 (1984).

ARTICLE 52.

Motions Practice.

§ 15A-951. Motions in general; definition, service, and filing.

CASE NOTES

Applied in State v. Marlow, — N.C. —, 313 S.E.2d 532 (1984).

§ 15A-953. Motions practice in district court.

CASE NOTES

Stated in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

Cited in State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

II. SPEEDY TRIAL.

B. Preindictment Delay.

Proof of Intentional Delay. —

To grant a motion to dismiss for preindictment delay, defendant must show both intentional delay on the part of the State in order to impair defendant's ability to defend himself and actual and substantial prejudice from the preindictment delay. State v. Parker, — N.C. App. —, 311 S.E.2d 321 (1984).

§ 15A-957. Motion for change of venue.

CASE NOTES

Discretion of Trial Judge. —

In accord with 2nd paragraph in original. See State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Defendant Must Show, etc. —

To acquire a change of venue defendant must prove existence of a prejudice so great that he cannot obtain a fair and impartial trial. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

What Defendant Must Show to Establish That Trial Was Unfair. — A defendant, in meeting his burden of showing that pretrial publicity precluded him from receiving a fair trial, must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objec-

tionable to the defendant sat on the jury. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

When Motion Should Be Granted. — A motion for a change of venue should be granted when it is established that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Legitimate concern of county residents in trying criminal defendants locally is not the test for determining whether venue should be changed. The test is whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Where each juror stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court, the trial court did not abuse its discretion in denying defendant's challenges for cause of these jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Stated in State v. Watson, — N.C. —, 312 S.E.2d 448 (1984).

§ 15A-958. Motion for a special venire from another county.

CASE NOTES

Stated in State v. Watson, — N.C. —, 312 S.E.2d 448 (1984).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-971. Definitions.

Legal Periodicals. —

For comment discussing search and seizure in North Carolina in light of State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982), see 19 Wake Forest L. Rev. 675 (1983).

For note discussing the exclusionary rule in probation revocation hearings in light of State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982), see 19 Wake Forest L. Rev. 845 (1983).

CASE NOTES

Evidence of Prior Conviction. — Not only is it preferable policy to require a defendant to object to or move to suppress the admission of evidence of a prior conviction in the sentencing stage of a criminal trial, such a requirement is consistent with the general procedural rules. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

Legal Periodicals. —

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Copeland, 64 N.C. App. 612, 307 S.E.2d 574 (1983); State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983).

Cited in State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. King, 64 N.C. App. 574, 307 S.E.2d 805 (1983).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Holloway, — N.C. App. —, 311 S.E.2d 707 (1984).

Cited in State v. Darack, — N.C. App. —, 312 S.E.2d 202 (1984).

II. FINDINGS OF FACT.

Judge is the finder of fact, etc. —

Where the trial judge makes his determination on a motion to suppress after a hearing, he must set forth in the record his findings of fact and conclusions of law. Such findings and conclusions are required in order that there may be a meaningful appellate review of the decision. State v. Horner, — N.C. —, 311 S.E.2d 281 (1984).

This section does not require that findings be made in writing at the time of the ruling. State v. Horner, — N.C. —, 311 S.E.2d 281 (1984).

Where defendant did not show prejudice from the failure of the trial court to make findings at the time that the rulings on motion to suppress were made his assignment of error is meritless. State v. Horner, — N.C. —, 311 S.E.2d 281 (1984).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

CASE NOTES

Corroboration Held Sufficient. —

Where there was independent corroboration of the testimony of the chief witness, defendant was not entitled to know the identity of the informant. State v. Willis, — N.C. App. —, 313 S.E.2d 173 (1984).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

Legal Periodicals. —
For comment discussing search and seizure in North Carolina in light of State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982), see 19 Wake Forest L. Rev. 675 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983).

Cited in State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983); State v. Holloway, — N.C. App. —, 311 S.E.2d 707 (1984); State v. Darack, — N.C. App. —, 312 S.E.2d 202 (1984).

II. APPEAL FROM DENIAL OF MOTION.

Notice of Intention to Appeal Required. —
In accord with 1st paragraph in original. See State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

CASE NOTES

Silence at Trial Precludes Raising Issue on Appeal. — Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Cited in State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); State v. Moore, 64 N.C. App. 686, 308 S.E.2d 358 (1983).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

CASE NOTES

Applied in State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983); State v. Smith, 310 N.C. 108, 310 S.E.2d 320 (1984).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

CASE NOTES

I. GENERAL CONSIDERATION.

The trial court has the power on its own motion to make inquiry at any time during trial regarding defendant's capacity to proceed. Indeed, circumstances could exist where the trial court has a constitutional duty to make such an inquiry. State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983).

Decision to Have Capacity Evaluated in Court's Discretion. — Although this section now requires a hearing, the decision to grant a motion for an evaluation of a defendant's capacity to stand trial remains within the trial judge's discretion. State v. Gates, — N.C. App. —, 309 S.E.2d 498 (1983).

Judge's Findings of Fact, etc. —

When the trial court, without a jury, determines a defendant's capacity to proceed to trial, it is the court's duty to resolve conflicts in the evidence; the court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary. State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983).

Lack of Findings and Conclusions Not Error Where Evidence Compels Ruling. — Although the better practice is for the trial court to make findings and conclusions when ruling on a motion under subsection (b) of this section, it is not error for the trial court to fail to do so where the evidence would have compelled the ruling made. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Where defendant had negotiated a plea, his fair trial rights are no longer involved. State v. Hunt, 64 N.C. App. 81, 306 S.E.2d 846, cert. denied, 309 N.C. 824, 310 S.E.2d 354 (1983).

Abuse of Discretion Must Be Shown for Reversal. — Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion before reversal is required. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Applied in State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

Cited in State v. Martin, — N.C. App. —, 314 S.E.2d 805 (1984).

II. HEARING.

Hearing Requirement Satisfied by Opportunity to Present Evidence. — The hearing requirement of subdivision (b)(3) of this section appears to be satisfied along as it appears from the record that the defendant, upon making the motion, is provided an opportunity to present any and all evidence he or she is prepared to present. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

No Particular Hearing Procedure Mandated. — Although this section requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated. The method of inquiry is still largely within the discretion of the trial judge. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Defendant has the burden of persuasion with respect to establishing his incapacity. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

ARTICLE 58.

Procedures Relating to Guilty Plea in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

CASE NOTES

Failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Attorney's Misunderstanding of Terms of

Plea Bargain Held Prejudicial. — Defendant was prejudiced by the failure of his attorney to inform him of a plea bargain offer, where the attorney had mistakenly interpreted the offer as being conditional upon acceptance of it by his codefendant and therefore did not communicate the offer to defendant when the codefendant did not accept. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Cited in State v. Simmons, 64 N.C. App. 727, 308 S.E.2d 95 (1983).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

CASE NOTES

Defendant Must Be Aware, etc. — Even though it is error under this statute and constitution for the court to fail to personally inquire of the defendant about his plea and to determine that the plea was voluntary and the informed choice of the defendant, under the total facts and circumstances of a case the error may be harmless beyond a reasonable doubt. Such as where the defendant fails to allege any facts to show that the pleas of guilty were involuntary, only that the judge did not ask him personally if they were voluntary. State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

A violation of subsection (b) of this section is error. State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

Applied in State v. Blandford, — N.C. App. —, 311 S.E.2d 338 (1984).

§ 15A-1026. Record of proceedings.

CASE NOTES

Applied in State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

Article 61.

Granting of Immunity to Witnesses.

§ 15A-1051. Immunity; general provisions.

CASE NOTES

Applied in State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983).

§ 15A-1052. Grant of immunity in court proceedings.

CASE NOTES

Applied in State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983); State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983).

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

CASE NOTES

Applied in State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

The purposes of mistrial are to prevent prejudice arising from conduct before the jury and to provide a remedy where the jury is unable to perform its function. Once the court has discharged the jury, there is no purpose in ordering a mistrial: the proceedings may be determined by rulings of the court on matters of law, including new trial motions. State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984).

When Motion Granted. —

A defendant's motion for mistrial must be granted, pursuant to this section if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. The decision as to whether such prejudice has occurred is addressed to the discretion of the trial judge. His decision is not reviewable absent a showing of gross abuse of discretion. State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

The retroactive declaration of a mistrial upon reconsideration has no valid basis in policy or law. This practice, if allowed, would impermissibly place a defendant who made any mistrial motion at any time in peril, subject to the unlimited discretion of the trial court, of losing his constitutional right to not be twice put in jeopardy for the same offense. State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984).

Scope of Review. — Basically, the determination whether the evidence causes substantial or irreparable prejudice to the defendant's case is within the discretion of the trial judge. The scope of review therefore is limited to whether in denying the motion for a mistrial there has been an abuse of judicial discretion. State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983).

Cited in State v. King, — N.C. App. —, 313 S.E.2d 281 (1984).

§ 15A-1062. Mistrial for prejudice to the State.

CASE NOTES

Applied in State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984).

§ 15A-1063. Mistrial for impossibility of proceeding.

CASE NOTES

The court may declare a mistrial when one of defendant's attorneys testifies for the State. State v. Malone, 65 N.C. App. 782, 310 S.E.2d 385 (1984).

Section 15A-1235(d) allows declaration of a mistrial on the same grounds as this section. State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984).

§ 15A-1064. Mistrial; finding of facts required.

CASE NOTES

The provisions of this section are simple and clear; their uniform application will protect valued rights of defendants and greatly facilitate the process of appellate review. State v. Jones, — N.C. App. —, 313 S.E.2d 808 (1984).

It is only a secondary purpose of this section to ensure that a full record is made. Its primary purpose is to protect the valued constitutional rights of criminal defendants. It would seriously weaken this protection if trial judges could ex post facto develop explanations for mistrial rulings. Findings must be made before the declaration to ensure full deliberation; the creation of a record subsequently is no substitute, except perhaps in a few isolated cases. State v. Jones, — N.C. App. —, 313 S.E.2d 808 (1984).

The purpose of this section is to ensure that mistrial is declared only where there exists real necessity for such an order. The right of the accused to completion of the proceedings before the same tribunal is thereby protected from sudden and arbitrary judicial action. State v. Jones, — N.C. App. —, 313 S.E.2d 808 (1984).

This section clearly requires findings of fact. Had the General Assembly wished to allow the matter to remain entirely in the discretion of the trial courts, it would have done so. Instead, in a departure from earlier law, the Legislature made such findings mandatory for all orders of mistrial. State v. Jones, — N.C. App. —, 313 S.E.2d 808 (1984).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

CASE NOTES

Subsection (b) requires trial judge to decide all challenges concerning the competency of jurors. Section 15A-1212 merely lists the various grounds for making challenges

to jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

If prospective juror has stated that he has an opinion as to how the case should come out, he may serve if it is established that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

I. GENERAL CONSIDERATION.

Section 15a-1211(b) requires the trial judge to decide all challenges concerning the competency of jurors. This section merely lists the various grounds for making challenges to jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

III. OPINION AS TO GUILT OR INNOCENCE.

Subsection (6) is a codification, etc. — In accord with original. See State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Which interpretation, etc. — In accord with original. See State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Generally, a juror who has formed an opinion as to defendant's guilt or innocence is not impartial and ought not serve. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Jurors need not be totally ignorant of the facts and issues involved. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Defendant must prove existence of an opinion in the juror's mind that will raise a presumption of partiality. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Juror May Serve if He Can Lay Aside Opinion. — If a prospective juror has stated that he has an opinion as to how the case should come out, he may serve if it is established that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Where each juror stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court, the trial court did not abuse its discretion in denying defendant's challenges for cause of these jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

§ 15A-1214. Selection of jurors; procedure.

CASE NOTES

I. GENERAL CONSIDERATION.

A trial court is not required to permit individual voir dire of jurors in a capital case. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Right to Challenge. —

The jury selection system permits parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. State v. Hedgepeth, — N.C. App. —, 310 S.E.2d 920 (1984).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v. Hedgepeth, — N.C. App. —, 310 S.E.2d 920 (1984).

Stated in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Watson, — N.C. —, 312 S.E.2d 448 (1984).

III. QUESTIONING OF PROSPECTIVE JURORS.

Whether to allow sequestration and individual voir dire is a matter for the trial court's discretion, and its ruling will not be reversed absent a showing of abuse of discretion. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

I. GENERAL CONSIDERATION.

Ordinary rulings by the court in the course of the trial do not amount to an impermissible expression of opinion. State v. Welch, 65 N.C. App. 390, 308 S.E.2d 910 (1983).

Trial judges must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury. State v. Sidbury, 64 N.C. App. 177, 306 S.E.2d 844 (1983).

But not every improper, etc. —

While not every improper remark will require a new trial, a new trial may be awarded if the remarks by the trial judge go to the heart of the case. State v. Sidbury, 64 N.C. App. 177, 306 S.E.2d 844 (1983).

Determination of Prejudice, etc. —

Expressions which may be erroneous when isolated are not grounds for reversal if, when considered contextually, the charge presents the law fairly and clearly. State v. Lofton, — N.C. App. —, 310 S.E.2d 633 (1984).

A defendant has a right to trial before an impartial judge, and any expression or intimation of an opinion by the judge which prejudices the jury against defendant is grounds for a new trial. The expression, however, must be viewed contextually, and whether a defendant was unduly prejudiced by the trial judge's remarks is determined by the probable effect on the jury in light of all the attendant circumstances, the burden being on defendant to show prejudice. State v. Lofton, — N.C. App. —, 310 S.E.2d 633 (1984).

Applied in State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984); State v. Hobson, — N.C. —, 313 S.E.2d 546 (1984); State v. Bean, — N.C. App. —, 310 S.E.2d 421 (1984).

Cited in State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983); State v. Cook, 65 N.C. App. 703, 309 S.E.2d 737 (1983).

§ 15A-1223. Disqualification of judge.

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

(1) Prejudiced against the moving party or in favor of the adverse party; or

(2) Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 6, effective July 1, 1984.

(3) Closely related to the defendant by blood or marriage; or

(4) For any other reason unable to perform the duties required of him in an impartial manner.

(e) A judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case. (1977, c. 711, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted subdivision (b)(2), which read "A witness for or against one of the parties in the case, or" and added subsection (e).

CASE NOTES

Failure of Judge, etc. —

Where there are no facts to cause a reasonable man knowing all the circumstances to doubt the judge's ability to rule on the motion to recuse in an impartial manner, there can be no error in such judge's failure to schedule a hearing on defendant's motion to recuse. State v. Crabtree, — N.C. App. —, 312 S.E.2d 219 (1984).

§ 15A-1224. Death or disability of trial judge.

CASE NOTES

Stated in State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984).

§ 15A-1225. Exclusion of witnesses.

CASE NOTES

Discretion of Court. —

In accord with original, see State v. Harrell, — N.C. App. —, 312 S.E.2d 230 (1984); State v. Davis, — N.C. App. —, 314 S.E.2d 828 (1984).

A trial judge may order the separation before trial of witnesses who are in the custody of the State. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The aim of sequestration is two-fold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid. State v. Harrell, — N.C. App. —, 312 S.E.2d 230 (1984).

The separation of witnesses is not founded on the idea of keeping the witnesses from intercourse with each other. That would be a vain attempt. The expectation is not to prevent the fabrication of false stories, but by separate cross-examination to detect them. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Due process does not automatically require separation of witnesses who are to testify to the same set of facts. State v. Harrell, — N.C. App. —, 312 S.E.2d 230 (1984).

Applied in State v. Stanley, — N.C. —, 312 S.E.2d 482 (1984).

Cited in State v. Byrd, — N.C. App. —, 312 S.E.2d 528 (1984).

§ 15A-1226. Rebuttal evidence; additional evidence.

CASE NOTES

Applied in State v. Ziglar, 308 N.C. 747, 304 S.E.2d 206 (1983); State v. Bellamy, 64 N.C. App. 454, 308 S.E.2d 88 (1983).

§ 15A-1227. Motion for dismissal.

CASE NOTES

I. GENERAL CONSIDERATION.

Section 15-173 Compared. —

In accord with 1st paragraph in original. See State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Applicability of Cases Dealing with Motion for Nonsuit. —

Cases pertaining to the sufficiency of the evidence under § 15-173 are also applicable to motions made pursuant to this section. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Evidence sufficient to overrule motion to dismiss is also sufficient to overrule motion for directed verdict, since both motions have the same legal effect. State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983).

Defendant's motion, etc. —

In accord with 2nd paragraph in original. See State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Applied in State v. Keyes, 64 N.C. App. 529, 307 S.E.2d 820 (1983).

II. QUESTION PRESENTED.

Question Presented to Court. —

In accord with 1st paragraph in original. See State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983).

In a motion to dismiss, the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury. State v. Thomas, 65 N.C. App. 539, 309 S.E.2d 564 (1983).

Upon defendant's motion for dismissal, the question for the trial court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) that defendant was the perpetrator of the offense. If there is such substantial evidence, the motion must be denied. However, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion should be allowed. In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Malloy, 309 N.C. 176, 305 S.E.2d 718 (1983).

Sufficiency, Not Weight, etc. —

In accord with 1st paragraph in original. See State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Test Same Whether, etc. —

In accord with 1st paragraph in original. See State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both. That test is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. If so the evidence is substantial and the defendant's motion to dismiss must be denied. State v. Malloy, 309 N.C. 176, 305 S.E.2d 718 (1983).

III. EVIDENCE ON MOTION.

A. In General.

What Evidence Must Show to Survive Motion. — The evidence, considered in the light most favorable to the State and indulging every inference in favor of the State, must be such that a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. State v. Thomas, 65 N.C. App. 539, 309 S.E.2d 564 (1983).

Substantial Evidence, etc. —

In order to withstand a motion to dismiss, the State's evidence as to each element of the offense charged must be substantial. Substantial evidence in this context means more than a scintilla. State v. Thomas, 65 N.C. App. 539, 309 S.E.2d 564 (1983).

The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged. State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

To withstand defendant's motion to dismiss, the State is required to show substantial evidence of each of the essential elements of the crime. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

Reasonable Inference, etc. —

If the trial court determines that a reasonable inference of defendant's guilt can be drawn from the evidence, then the defendant's motion to dismiss should be denied and the case should be submitted to the jury. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Suspicion Insufficient, etc. — If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss should be allowed. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

It is immaterial whether the evidence is direct, circumstantial, or both. State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983).

Evidence Must Be Considered, etc. — In making its determination on the sufficiency of the evidence pursuant to a motion to dismiss under this section, the trial court must consider the evidence in the light most favorable to the State. The State is entitled to every reasonable inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be considered by the trial court in ruling on the motion. State v. Malloy, 309 N.C. 176, 305 S.E.2d 718 (1983).

In accord with 1st paragraph in original. See State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983); State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983); State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983).

In accord with 2nd paragraph in original. See State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983).

In accord with 3rd paragraph in original. See State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

Evidence of Motive and Opportunity. — When the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer appears to rest more upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable "bright line" test. State v. Bell, 65 N.C. App. 234, 309 S.E.2d 464 (1983).

Evidence of either motive or opportunity alone is insufficient to carry a case to the jury. State v. Bell, 65 N.C. App. 234, 309 S.E.2d 464 (1983).

Sufficiency of Fingerprint Evidence. — The rule in a case involving fingerprint evidence is that a motion for dismissal or nonsuit is properly denied if, in addition to testimony by a qualified expert that the fingerprints at the scene of the crime match those of the accused, there is substantial evidence of circumstances from which a jury could find that the fingerprints were impressed at the time the crime was committed. State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983).

B. Substantial Evidence.

What is substantial evidence is a question of law for the court; what the evidence proves or not is a question for the jury. State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983).

C. Defendant's Evidence.

Court must consider defendant's evidence which explains or clarifies that offered by the State. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

Court must consider defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

§ 15A-1230. Limitations on argument to the jury.

CASE NOTES

Argument of Prior Misconduct as Substantive Evidence of Guilt Held Cured by Instruction. — While it is proper to refer to evidence of prior acts of misconduct in the arguments on the issue of credibility, it is improper for the prosecutor to argue defendant's prior misdeeds for purposes other than mere impeachment, that is, attempting to use these prior acts as substantive evidence of defendant's guilt. But, where each time defendant objected to the challenged remarks, the objections were sustained and the trial judge carefully instructed the jury that they were to consider the evidence of defendant's past behavior only as he would explain in his charge, and the judge then later gave a complete and accurate instruction relating to the jury's consideration of defendant's prior acts of misconduct, the remarks did not constitute prejudice to defendant such that the trial judge was required to declare a mistrial on his own motion. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

§ 15A-1231. Jury instructions.

CASE NOTES

Unrecorded Conference Required Absent Request. — If either party to the trial desires a recorded instruction conference, subsection (b) of this section requires that party to make such a request to the trial judge. Absent such a request, subsection (b) is silent and Rule 21 of the General Rules of Practice for Superior and District Courts supplements the statute by requiring the trial court to hold an unrecorded conference. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Applied in State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983); State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983); State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983); State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984); State v. Bean, — N.C. App. —, 310 S.E.2d 421 (1984); State v. Godwin, — N.C. App. —, 314 S.E.2d 265 (1984).

Cited in State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983).

II. EXPRESSION OF OPINION.

A. In General.

An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed. State v. Morrison, 63 N.C. App. 125, 303 S.E.2d 849 (1983).

Whether Directly or Indirectly, etc. —

Because of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly. State v. Morrison, 63 N.C. App. 125, 303 S.E.2d 849 (1983).

F. Rulings on Witnesses and Evidence.

Comment before Jury on Objection to State's Request for Instructions. — It was not prejudicial error for the trial judge to comment before the jury that the defendants' lawyers had objected to the State's request to give additional instructions on intent, where, while it may have been better practice to have simply noted the objections in the record, the defendants have failed to establish how they might have been prejudiced by the court's remarks, the judge's comments did not convey to the jury the "impression of judicial leaning." State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

G. Weight and Credibility of Testimony, etc.

When evidence is competent for one purpose, but not for another, the party against whom it is offered is entitled, upon request, to have the jury instructed to consider it only for the purposes for which it is competent. State v. Foster, 63 N.C. App. 531, 306 S.E.2d 126 (1983).

III. JURY INSTRUCTIONS.

A. In General.

Charge to the jury, etc. —

In accord with 5th paragraph in original. See State v. Hockett, 309 N.C. 794, 309 S.E.2d 249 (1983).

In determining whether an instruction requested by defendant is supported by evidence, and therefore should be given, at least in substance, the evidence must be interpreted in the light most favorable to him. In making this determination the trial judge is concerned only with the sufficiency of the evidence; its credibility is for the jury to determine, not the court. State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

Circumstantial Evidence. — A jury instruction as to the effect of circumstantial evidence should be given only when there is no direct evidence. If either the State or the defen-

dant elicits direct evidence bearing on any issue for the jury's determination, then such an instruction is not appropriate. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

D. Summary of Evidence.

It is sufficient for the trial judge, etc. — A trial judge need only summarize the evidence to the extent necessary to apply the law relevant to the case. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Evidence Tending to Impeach. — Testimony which merely tends to impeach or show bias is not substantive in nature and need not be summarized. State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983).

E. Subordinate Features of Case.

Since It Is Not Required. — In accord with 2nd paragraph in original. See State v. Saunders, 64 N.C. App. 350, 307 S.E.2d 197 (1983).

F. Instructions as to Particular Offenses.

Charge on Involuntary Manslaughter. — Where the record in a first-degree murder prosecution contained no evidence which tended to show that the victim died as the result of an unlawful act not amounting to a felony or as the result of an unlawful act that was not naturally dangerous to human life, it was error to permit the jury to consider an involuntary manslaughter charge, and since it appeared that there was a reasonable possibility that the defendant would have been acquitted if the involuntary manslaughter issue had not been submitted, the error had to be held prejudicial. State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

G. Miscellaneous Instructions.

Reasonableness of Detention of Homicide Victim. — Defendant was entitled to requested instruction concerning the reasonableness of his armed detention of homicide victim only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated in § 15A-404(b) had been committed; (2) defendant was trying to "detain" the offender until the police arrived; and (3) the manner of detention was reasonable under the circumstances. State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

Instruction that Defendant Was "Scared and Confused" Held Not Required. — Taking the victim's car "while scared and confused" in order to escape the scene of a murder does not mean that defendant would not be guilty of armed robbery. The trial court would not err in failing to so instruct the jury. This evidence is not necessarily exculpatory, even if it is believed. State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983).

§ 15A-1234. Additional instructions.

CASE NOTES

Judge is not required to repeat instructions which have been previously given to the jury in the absence of some error in the charge. Needless repetition is undesirable and has been held erroneous on occasion. State v. Hockett, 309 N.C. 794, 309 S.E.2d 249 (1983).

Failure to Answer Question as to Whether Particular Element Proved. — Where the jury had some question as to whether the State had proved beyond a reasonable doubt that the perpetrator of a sexual offense was armed with a dangerous or deadly weapon, and thus, they were inquiring as to the effect of such a finding upon their determination of guilt on the various offenses charged, it was prejudicial error for the trial judge not to answer jury questions on this point. State v. Hockett, 309 N.C. 794, 309 S.E.2d 249 (1983).

§ 15A-1235. Length of deliberations; deadlocked jury.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

Applied in State v. Bunn, — N.C. App. —, 310 S.E.2d 792 (1984).

Stated in State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984).

§ 15A-1240. Impeachment of the verdict.

CASE NOTES

Observation of Codefendant in Handcuffs Prior to Defendant's Trial. — Affidavit of one of defendant's jurors, which stated that before defendant's trial some of defendant's jurors observed codefendant, who was tried separately, emerging from courtroom in handcuffs and assumed he had been convicted, did not contain any information permitted by subdivisions (c)(1) or (c)(2) of this section. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

§ 15A-1241. Record of proceedings.

CASE NOTES

Applied in State v. Colbert, 65 N.C. App. 762, 310 S.E.2d 145 (1984).

Cited in State v. Wallace, 309 N.C. 141, 305 S.E.2d 548 (1983).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

Cited in State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983).

§ 15A-1243. Standby counsel for defendant representing himself.

CASE NOTES

Applied in State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Civil commitment of defendants found not guilty by reason of insanity.

CASE NOTES

Applied in State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983).

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

CASE NOTES

The Fair Sentencing Act does not require a defendant to forego all possible defenses before he may take advantage of statutory mitigating factors. State v. Puckett, — N.C. App. —, 312 S.E.2d 207 (1984).

Cited in State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

§ 15A-1334. The sentencing hearing.

CASE NOTES

I. GENERAL CONSIDERATION.

Opportunity to Prepare for Hearing. — Though the demands on the time of trial judges are very onerous, and they have broad discretion in conducting the business of the courts, the sentencing process, especially since the Fair Sentencing Act was adopted, is nevertheless an important part of any trial that must be fairly processed, and a hearing that a defendant has no opportunity to prepare for is not the kind of hearing that the act requires. State v. Ataei-Kachuei, — N.C. App. —, 314 S.E.2d 751 (1984).

Continuance Within Discretion, etc. — Motion to continue sentencing hearing is addressed to the discretion of the trial judge who may grant it on good cause. State v. Blandford, — N.C. App. —, 311 S.E.2d 338 (1984).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§ 15A-1340.1. Applicability of Article 81A; life sentence.

Legal Periodicals. —
For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Application of Article. —
The Fair Sentencing Act clearly mandates that the act is applicable only to felonies that occur on or after July 1, 1981. Therefore, it is error for trial judge to aggravate a charge on the basis of evidence relating to a pre-Act crime. State v. Jones, — N.C. App. —, 311 S.E.2d 351 (1984).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The trial judge still has discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within his sound discretion. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

For the purposes of sentencing under the Fair Sentencing Act, a preponderance of the evidence does not mean number of witnesses or volume of testimony, but refers to the reasonable impression made upon the mind of the sentencing judge by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and means of knowledge, and other attending circumstances. State v. Atkins, — N.C. App. —, 310 S.E.2d 629 (1984).

The Fair Sentencing Act does not require a defendant to forego all possible defenses before he may take advantage of the statutory mitigating factors. State v. Puckett, — N.C. App. —, 311 S.E.2d 207 (1984).

Discretion to Impose Consecutive or Concurrent Sentences. — Although the General Assembly did not address the issue of consecutive sentences in the Fair Sentencing Act, § 15A-1340.1 et seq., it left substantially intact § 15A-1354(a), which vests the sentencing judge with discretion to impose either consecutive or concurrent sentences. Since § 15A-1354(a) was in effect when the Legislature enacted the Fair Sentencing Act, the Legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Leaving sentencing judges with unbridled discretion on the matter of whether to run multiple sentences concurrently or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, the Legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the Legislature, there is nothing inherent in consecutive sentencing which violates the Fair Sentencing Act, § 15A-1340.1 et seq. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Imposition of consecutive sentences for rape, first-degree sex offense, first-degree burglary and armed robbery violates neither the Fair Sentencing Act, § 15A-1340.1 et seq., nor any constitutional proportionality requirement. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Applied in State v. Jones, 309 N.C. 214, 306 S.E.2d 451 (1983); State v. Cauthen, — N.C. App. —, 311 S.E.2d 649 (1984).

Cited in State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983).

§ 15A-1340.2. Definitions.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

Applied in State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

§ 15A-1340.3. Purposes of sentencing.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. However, it is not clear the extent to which the act limits the sentencing discretion of the trial judge. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The trial judge still has discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within his sound discretion. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The Fair Sentencing Act does not specifically preclude a finding of perjury as an aggravating factor to be weighed in considering the sentence to be imposed upon a defendant, provided, of course, the finding meets the requirements of § 15A-1340.4; however, in view of some of the potential dangers inherent in this particular factor and also of its peculiar nature, a trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except in the most extreme case. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the state may institute prosecution for this separate and distinct crime. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Applied in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Higson, — N.C. —, 312 S.E.2d 437 (1984).

Stated in State v. Eason, — N.C. App. —, 313 S.E.2d 221 (1984).

§ 15A-1340.4. Presumptive punishment for felony other than Class A or Class B felony; prior felony convictions; consideration of aggravating and mitigating factors; written findings.

CASE NOTES

Legal Periodicals. —
For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

V. Proof of Prior Conviction.
VI. Indigency and Representation by Counsel at Time of Prior Conviction.

I. GENERAL CONSIDERATION.

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. However, it is not clear the extent to which the act limits the sentencing discretion of the trial judge. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Weighing of aggravating and mitigating factors, etc. —

Except for maximum sentence limitations in § 14-1.1, the severity of a sentence imposed pursuant to this Article, insofar as it is based on a weighing of aggravating and mitigating factors, is within the discretion of the judge. State v. Salters, 65 N.C. App. 21, 308 S.E.2d 512 (1983).

Trial judges continue to have great discretion with respect to balancing factors found in aggravation against factors found in mitigation, and this balancing process, if correctly carried out, will not be disturbed on appeal. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

And Will Not Be Disturbed, etc. —

Only one factor in aggravation is necessary to support a sentence greater than the presumptive term. The trial judge must determine that this factor is proved by a preponderance of the evidence and outweighs any mitigating factors. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. With these rules in mind the trial judge may wish to exercise restraint when considering nonstatutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing. State v. Baucom, — N.C. App. —, 311 S.E.2d 73 (1984).

This Article did not remove, etc. —

In accord with 1st paragraph in original. See State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

This Article did not remove all discretion from trial judges. It is necessary that trial judges be permitted great latitude in ascertaining the true existence of aggravating and mitigating circumstances. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Weight attached to particular aggravating or mitigating circumstances in a case is within the discretion of the trial judge. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983).

One aggravating factor may outweigh two or more mitigating factors (and vice versa) in the process of balancing the weight to be given any factor, and in determining the sentence to be imposed. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. State v. Mitchell, — N.C. App. —, 313 S.E.2d 201 (1984).

This section does not require, etc. —

The court can use an aggravating factor not set forth in subsection (a)(1) of this section if it reasonably relates to the purposes of

sentencing. State v. Nichols, — N.C. App. —, 311 S.E.2d 38 (1984).

The statute does not purport to grant trial judge the discretion to create new aggravating factors. Rather, the statute lists several aggravating factors which the trial judge is required to consider and also authorizes him to consider any other aggravating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

The Fair Sentencing Act does specifically preclude a finding of perjury as an aggravating factor to be weighed in considering the sentence to be imposed upon a defendant, provided, of course, the finding meets the requirements of this section; however, in view of some of the potential dangers inherent in this particular factor and also of its peculiar nature, a trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except in the most extreme case. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the state may institute prosecution for this separate and distinct crime. State v. Thompson, — N.C. —, 311 S.E.2d 866 (1984).

Circumstances that are inherent in the crime convicted of may not be used as aggravating factors in order to increase the punishment beyond what the Legislature has set for the offense involved. State v. Coffey, 65 N.C. App. 751, 310 S.E.2d 123 (1984).

It was error for the trial court to consider the same evidence of defendant's mental problems to support more than one aggravating factor. State v. Jones, — N.C. App. —, 311 S.E.2d 351 (1984).

When the facts justify an inference of malice arising only from the use of a deadly weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing. The rule is applicable to both convictions or pleas in first or second-degree murder cases where malice is an essential element. State v. Lattimore, — N.C. —, 311 S.E.2d 876 (1984).

This section specifically prohibits, as an aggravating factor, the use of convictions for offenses joinable, under Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced. To permit the trial judge to find as a nonstatutory aggravating factor that the defendant committed the joinable offense would virtually eviscerate the purpose and policy of the statutory prohibition. State v. Lattimore, — N.C. —, 311 S.E.2d 876 (1984).

The use of evidence of an element of a joinable offense with which defendant has not been charged to show additional criminal acts committed during the crime for which defendant is being sentenced as factors in aggravation is even less valid than the use of evidence of the commission of joinable offense for which a defendant has been convicted. State v. Puckett, — N.C. App. —, 312 S.E.2d 207 (1984).

Where the crime that defendant was convicted of is based on the relationship of parent and child, that relationship cannot be used again to exceed the presumptive sentence. State v. Young, — N.C. App. —, 312 S.E.2d 665 (1984).

The trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defendant is convicted of a § 14-32 assault. State v. Braswell, — N.C. App. —, 313 S.E.2d 216 (1984).

A defendant may not be penalized for electing to plead not guilty. State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984).

Judge is required to find factors proved by uncontradicted and manifestly credible evidence. State v. Potts, 65 N.C. App. 101, 308 S.E.2d 754 (1983).

This Article did not eliminate the existing discretionary system; it only established certain guidelines for trial judges, which if correctly observed, still leave an open door for disparity of sentences. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Failure to Do So Is Error. — In order to give proper effect to the Fair Sentencing Act, the appellate court must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Scope of Review. — In sentencing review, the Court of Appeals looks not for errors in

judgment, but only for errors of law. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Applied in State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983); State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Huntley, 62 N.C. App. 577, 303 S.E.2d 330 (1983); State v. Cantrell, 64 N.C. App. 207, 306 S.E.2d 555 (1983); State v. Rivers, 64 N.C. App. 554, 307 S.E.2d 588 (1983); State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); State v. Jones, 64 N.C. App. 505, 307 S.E.2d 823 (1983); State v. Strange, 64 N.C. App. 614, 307 S.E.2d 856 (1983); State v. Simmons, 64 N.C. App. 727, 308 S.E.2d 95 (1983); State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983); State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984); State v. Higson, — N.C. —, 312 S.E.2d 437 (1984); State v. Murray, — N.C. —, 313 S.E.2d 523 (1984); State v. Cook, 65 N.C. App. 703, 309 S.E.2d 737 (1983); State v. McIntyre, 65 N.C. App. 807, 310 S.E.2d 119 (1984); State v. Simmons, 65 N.C. App. 804, 310 S.E.2d 139 (1984); State v. Abdullah, — N.C. App. —, 310 S.E.2d 413 (1984); State v. Bunn, — N.C. App. —, 310 S.E.2d 792 (1984); State v. Thompson, — N.C. App. —, 312 S.E.2d 212 (1984); State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984); State v. Benfield, — N.C. App. —, 313 S.E.2d 198 (1984); State v. Goforth, — N.C. App. —, 313 S.E.2d 595 (1984); State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984).

Stated in State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); State v. Turner, — N.C. App. —, 311 S.E.2d 331 (1984); State v. Williams, — N.C. App. —, 313 S.E.2d 170 (1984); State v. Harris, — N.C. App. —, 313 S.E.2d 915 (1984).

Cited in State v. Foster, 63 N.C. App. 507, 305 S.E.2d 219 (1983); State v. Lipscomb, 65 N.C. App. 161, 308 S.E.2d 654 (1983); Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983); State v. Byrd, — N.C. App. —, 312 S.E.2d 528 (1984).

II. AGGRAVATING FACTORS.

Many of factors listed under subdivision (a)(1) contemplate a duplication in proof without violating the proscription that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Impact on Victim. — Relevant to the question of sentencing and properly considered under subdivision (a)(1) of this section is the impact of the crime on the victim. Where the physical or emotional injury is in excess of that normally present in the offense, multiple injuries would be an important consideration either as an additional factor in aggravation or as proof that the offense was especially heinous, atrocious, or cruel. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

The focus of subdivision (a)(1)(a) of this section is not on the role of the participants in the crime, but on the role of the defendant in inducing others to participate or in assuming a position of leadership. State v. Lattimore, — N.C. —, 311 S.E.2d 876 (1984).

Danger to Self and Others. —

The trial judge may properly find as an aggravating factor that defendant was dangerous to others as a result of his social and emotional problems, even though evidence of his social and emotional problems was also considered in mitigation. State v. Jones, — N.C. App. —, 311 S.E.2d 351 (1984).

Use of Deadly Weapon — Generally. — When the facts justify an instruction on the inference of malice arising as a matter of law from the use of a deadly weapon, evidence of the use of that deadly weapon may not be used as an aggravating factor at sentencing. This "bright-line" rule avoids hair-splitting factual disputes necessitated by having to second guess jury decisions as to the existence of malice. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

Where malice can be inferred from a murder perpetrated by the use of a deadly weapon, irrespective of whether defendant is convicted of or pleads to the charge, use of the deadly weapon will be deemed evidence necessary to prove the element of malice. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

Short of requiring every jury to specify upon what facts and circumstances it relied in determining the existence of malice, it is simply not possible to conclude, with any degree of certainty, that a jury instructed on the inference of malice would not have considered the use of a deadly weapon as evidence necessary to prove the element of malice. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

Existence of Deadly Weapon May Be Used to Support More than One Factor. — In a prosecution for two murders, use of the existence of a deadly weapon in finding both the aggravating circumstance that the defendant was armed with a deadly weapon and the aggravating circumstance that each murder was committed during a course of conduct in which defendant engaged in an act of violence against another person, is proper, since although the deadly weapon is common to both factors, evidence tending to prove each factor must necessarily be different. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Use of Deadly Weapon Not a Factor Where Its Use Justifies Inference of Malice. — A per se rule exists in this State that, when

the facts justify an inference of malice arising from the use of a deadly weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing. Even where defendant pleads guilty, use of the deadly weapon is deemed to be evidence necessary to prove the element of malice. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Pretrial Release as to Other Charges May Constitutionally Be Considered. — Whether or not one on pretrial release on another felony charge is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The Legislature may constitutionally require that it be considered. State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983).

Sentence Subsumed within Prior Conviction Factor. — Because the Legislature specifically authorized the use of prior convictions as an aggravating factor, it is an indication that the sentence, whether suspended or served actively, is subsumed within that legislated factor. It was improper to consider both a prior conviction and serving of a prison sentence as aggravating factors. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

Prior Conviction and Commission of Offense While Sentence Suspended Are Distinct Factors. — Defendant's prior conviction for an offense punishable by more than 60 days and the fact that, at the very time he committed the offense for which he was being tried, he was under a suspended sentence for the prior felony conviction are two clearly distinct aggravating factors. State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983).

Indication of Conviction Relied upon Aids Appellate Review. — It would be helpful for purposes of appellate review for trial judges to note the conviction or convictions specifically relied upon under subdivision (a)(1)o of this section, particularly where the method of proof or the issue of representation by counsel is raised at the sentencing hearing. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

The age of the victim may not be used as an aggravating factor unless it appears that the defendant took advantage of the victim's relative helplessness to commit the crime or that the harm was worse because of the age or condition of the victim. State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

Age of the victim is not reasonably related to the purposes of sentencing, as required by subsection (a) of this section, unless culpability is enhanced by defendant's having taken advantage of the victim's relative defenselessness occasioned by age. State v. Eason, — N.C. App. —, 313 S.E.2d 221 (1984).

Vulnerability is clearly the concern addressed by paragraph (a)(1)j of this section. State v. Eason, — N.C. App. —, 313 S.E.2d 221 (1984).

The underlying policy of paragraph (a)(1)j of this section is to discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity. State v. Eason, — N.C. App. —, 313 S.E.2d 221 (1984).

Taking of Large Sum of Money in Robbery with Firearms. — Since the offense of robbery with firearms does not require proof that money was actually taken, the taking of a large sum of money is properly considered as an aggravating factor. State v. Thompson, 64 N.C. App. 485, 307 S.E.2d 838 (1983).

Intoxication of Victim. — Intoxication of the defendant has been recognized as a mitigating factor by the courts. It would be both unreasonable and unfair to allow defendant's intoxication to be considered a mitigating factor but not to allow the victim's intoxication to be an aggravating factor. Clearly the Legislature did not intend this result. State v. Potts, 65 N.C. App. 101, 308 S.E.2d 754 (1983).

Serious injury may be an aggravating factor. State v. Nichols, — N.C. App. —, 311 S.E.2d 38 (1984).

Insufficient Presumptive Sentence. — It is error for the trial judge to find, as an additional aggravating factor, that the presumptive sentence of 15 years does not do justification to the seriousness of this crime. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

Deterrence Not Considered, etc. —

Since deterrence, a basic purpose of all sentencing, was necessarily considered by the Legislature in establishing presumptive sentences for the various crimes, it cannot also be the basis for trial judges exceeding the presumptive terms. State v. Partridge, — N.C. App. —, 311 S.E.2d 53 (1984).

New Hearing Required Where Factor Erroneously Found. — When the trial court erroneously finds any aggravating factor to exist, the defendant is entitled to a new sentencing hearing. State v. Green, 309 N.C. 623, 308 S.E.2d 326 (1983).

In every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

III. MITIGATING FACTORS.

Failure to find a mitigating factor when the evidence in support of such is substantial

constitutes reversible error. However, in order for the appellate court to make the determination of whether evidence of this nature was introduced at trial and at the sentencing hearing, the record on appeal must reveal what the evidence is in a direct and concise manner. State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984).

When evidence in support of a particular mitigating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act. State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984).

The sentencing judge cannot, as a matter of law, refuse to consider mitigating factors after a jury has determined that defendant committed the crime, even though defendant has presented an alibi defense at the guilt determination stage of the trial. State v. Brooks, — N.C. App. —, 314 S.E.2d 565 (1984).

Defendant Bears Burden of Persuasion. — A defendant at a sentencing hearing under this Article bears the burden of persuasion on mitigating factors. When he argues that his evidence is such as to compel the finding of a mitigating factor, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn," and that the credibility of the evidence "is manifest as a matter of law." State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

The State bears the burden of persuasion on aggravating factors if it seeks a term greater than the presumptive. Likewise, the defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. Thus, when a defendant argues that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law. State v. Jones, 309 N.C. 214, 306 S.E.2d 451 (1983).

Defendant is required to prove mitigating factors by a preponderance of the evidence. His position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983).

Circumstances set forth in subdivisions (a)(2)d and (a)(2)e are different. The one which the sentencing judge found deals with a mental disease or illness, such as chronic brain syndrome, which in this case impaired defendant so as to reduce significantly his culpability. The other circumstance, which the sentencing judge did not find, concerns a defendant's "immaturity" or "limited mental capacity" which likewise significantly reduces culpability. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Evidence Simply that Mental or Physical Condition Exists. — While a mental or physical condition, such as alcoholism, may be capable of reducing a defendant's culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. Defendant has the burden of proof with respect to any alleged mitigating factors. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983).

For definition of "infirm," see State v. Potts, 65 N.C. App. 101, 308 S.E.2d 754 (1983).

"Limited mental capacity" as used in subdivision (a)(2)e of this section is used in the sense of limited intelligence or low I.Q. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

"Strong provocation," as used in subdivision (a)(2)i, etc. —

In enacting subparagraph (a)(2)(i) of this section, the Legislature apparently had in mind circumstances that morally shift part of the fault for a crime from the criminal to the victim. State v. Martin, — N.C. App. —, 314 S.E.2d 805 (1984).

Legislature did not intend to provide shorter prison terms for defendants motivated by jealousy or rage. State v. Puckett, — N.C. App. —, 312 S.E.2d 207 (1984).

Cooperative Conduct. — The judge, if he finds that defendant's conduct was cooperative, though not sufficient to fit within subdivision (a)(2)h, can consider it as a factor in mitigation of his sentence. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983).

Pleas of guilty should not be considered as mitigating factors during sentencing. State v. Tyler, — N.C. App. —, 311 S.E.2d 354 (1984).

The election not to testify so as to avoid giving perjured testimony may not be considered as a mitigating factor. State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984).

Willingness to Testify against Codefendant. — Evidence that a defendant testified truthfully against a codefendant is one statutory factor which a trial judge must consider in passing sentence under this Article. However, evidence that a defendant was merely

willing to testify against a codefendant does not meet the statutory requirement. Nevertheless, a trial judge may properly consider nonstatutory mitigating factors in setting a sentence, so long as those factors are logically related to the purposes of sentencing. The crucial difference is that a trial judge must consider the presence or absence of the statutory mitigating and aggravating factors; whereas a trial judge may, but is not required to consider nonstatutory mitigating factors. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Drug addiction is not per se a statutorily enumerated mitigating factor. It could perhaps be found to mitigate the offense, either under the rubric of the enumerated factors, or otherwise as being reasonably related to the purposes of sentencing. State v. Bynum, 65 N.C. App. 318, 310 S.E.2d 388 (1984).

Ignorance of the legal implications of an act, nothing else appearing, is not tantamount to a mental condition sufficient to reduce one's culpability. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983).

That defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences is a mitigating factor that is present when a defendant takes action to avoid harmful results of his criminal action, such as ensuring that accomplices are not armed with weapons. It does not refer to attempts by a criminal defendant to restrain himself from committing the criminal act itself. State v. Puckett, — N.C. App. —, 312 S.E.2d 207 (1984).

"The Criminal Process" as Used in Subdivision (a)(2)l. — The Legislature contemplated that "the criminal process" as used in subdivision (a)(2)l of this section involves formal legal proceedings and not merely investigation of crimes by law enforcement officers. "The criminal process" begins upon either the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or upon arrests, whichever comes first. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Acknowledgement of wrongdoing. — The trial judge, in sentencing a convicted murderer, erred in failing to find as a mitigating factor the fact that defendant voluntarily acknowledged wrongdoing prior to arrest, where the State's own uncontradicted evidence was that defendant told the police immediately upon their arrival at the scene that he shot his wife and then shot himself. State v. Martin, — N.C. App. —, 314 S.E.2d 805 (1984).

Confession prior to Warrant, Information, Indictment, Presentment, or Arrest. — If defendant's confession was made prior to the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first, he is entitled to a finding of the mitigating circumstance set forth in subdivision (a)(2)l of this section. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Discretion as to Weight Given Acknowledgment of Wrongdoing. — Although a trial judge may be required to find in mitigation that a defendant voluntarily acknowledged wrongdoing in connection with the offense, the weight to be given to that factor remains within his sound discretion. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Motive in Acknowledging Guilt Goes to Weight Given It. — The defendant's motive in acknowledging his guilt at an early stage does not go to the existence of the mitigating factor of acknowledgment of wrongdoing, but goes to the weight the trial judge must give that factor. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Fact Finder to Determine if Confession Shows Remorse. — The policy that the defendant show remorse for his actions is consistent with the purpose of this Article. Whether the confession reflects remorse is a matter for the fact finder to determine. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Evidence of Character and Reputation to Be Liberally Received. — Under subdivision (a)(2)m of this section, a defendant's character and his reputation in the community where he lives are direct issues in the case for purposes of sentencing. Evidence of both, therefore, should be liberally received, not only because they are directly in issue but also because the court accords more liberality in the admissibility of evidence when it is being considered by a trial judge for purposes of sentencing than when by a jury for some other purpose. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Character encompasses both a person's past behavior and the opinion of members of his community arising from it. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Winnex, — N.C. App. —, 311 S.E.2d 594 (1984).

Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983).

Good character is something more than the absence of bad character. It means that defendant must have conducted himself as a man of upright character ordinarily would, should or does. State v. Winnex, — N.C. App. —, 311 S.E.2d 594 (1984).

Possession of the quiet virtue of good manners and a law-abiding life do not necessarily constitute a good character. State v. Winnex, — N.C. App. —, 311 S.E.2d 594 (1984).

Methods of Proving Good Character. — When the defendant in his sentencing hearing produces evidence of his good character in order to take advantage of that particular mitigating circumstance, character becomes "a direct issue in the case" and thus not limited to the traditional methods of proof but may be proved by specific acts as well as by reputation and by the opinions of others. In such circumstances good character, or the lack of it, is a direct issue in the case because it is one of the factors that may diminish or increase the offender's culpability and thus an important consideration to be taken into account in sentencing. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983).

Good moral character is seldom subject to proof by reference to one or two incidents. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983).

Evidence of good character or reputation must be at least substantial. State v. Winnex, — N.C. App. —, 311 S.E.2d 594 (1984).

Proof of good character requires inherently credible evidence. Even where favorable character evidence is uncontradicted, the trial judge may determine that the witnesses are unreliable and hold that defendant has failed to meet his burden of proof. State v. Winnex, — N.C. App. —, 311 S.E.2d 594 (1984).

For discussion of permissible indicia of unreliability of character witnesses, see State v. Winnex, — N.C. App. —, 311 S.E.2d 594 (1984).

IV. FACTORS CONSTITUTING ELEMENTS OF OFFENSE.

Pecuniary Gain. — Pecuniary gain is not an essential element of the crime of armed robbery. State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983).

Possession of Firearm — Armed Robbery. —

One essential element necessary to prove the offense of armed robbery is that of the possession, use or threatened use of a firearm or other dangerous weapon. Thus the use of this factor is proscribed under this section. State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983).

V. PROOF OF PRIOR CONVICTION.

Methods of Proof in Subsection (e) Permissive, Not Mandatory. — Proof of a prior conviction by either stipulation of the parties or by the original or certified copy of the court record of the prior conviction, are not the exclusive methods by which prior convictions may be shown. The enumerated methods of proof of subsection (e) of this section are permissive rather than mandatory. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

The language of subsection (e) of this section is permissive rather than mandatory respecting methods of proof. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Other Methods Not Precluded. — Prior convictions may be proved by stipulation or by original certified copy of the court record, not that they must be. The statute does not preclude other methods of proof. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

The more appropriate way to show the "prior conviction" aggravating circumstance would be to offer authenticated court records, for such records establish a prima facie case. However, the Legislature did not intend to bind the State and the trial court by precluding other means of proof. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Defendant's own statements under oath constitute an acceptable alternate method of proof of a prior conviction. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

VI. INDIGENCY AND REPRESENTATION BY COUNSEL AT TIME OF PRIOR CONVICTION.

Burden on Defendant to Show Indigency and Lack of Counsel. — The initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. If the defendant elects to challenge the admissibility of evidence of his prior convictions, he must do so by a method which informs the court of the specific reason for his objection; i.e. that he was indigent and unrepresented by counsel at the time of the prior conviction or convictions. A mere objection to the evidence alone will not be sufficient. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Pursuant to subsection (e) of this section, the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. State v. Norris, 65 N.C. App. 336, 309 S.E.2d 507 (1983).

The onus is on the defendant to inform the court that he is prepared on voir dire to offer proof that he was indigent and unrepresented by counsel at the time of the prior convictions. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Burden Not on State. — The State does not have the burden to raise and prove nonindigency and representation by counsel or waiver of counsel in order to support a finding that the defendant had a prior conviction or convictions. State v. Callicutt, 309 N.C. 626, 308 S.E.2d 333 (1983).

The State need not initially raise and prove nonindigency and representation by counsel or waiver of counsel in order to support a finding that the defendant had a prior conviction or convictions. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Use of Prior Conviction Not Error Where Defendant Fails to Contest Validity. — It is not error for the trial court to consider a prior conviction as an aggravating circumstance absent evidence that defendant was not indigent or was represented by counsel at the prior conviction, where defendant does not make an issue of the validity of the prior conviction in the trial court. State v. Massey, 309 N.C. 625, 308 S.E.2d 332 (1983).

Where the defendant did not object to the introduction of evidence of his prior conviction or convictions, nor did he allege that he was indigent and not represented by counsel at the time of his prior conviction or convictions, the State's failure to show that, at the time of his prior conviction or convictions, the defendant either was not indigent or was represented by or waived counsel does not render the finding of this aggravating factor by the trial court erroneous. State v. Green, 309 N.C. 623, 308 S.E.2d 326 (1983).

Silence at Trial Precludes Review on Appeal. — Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

§ 15A-1340.7. Service of term of imprisonment; credit for good behavior; prisoner conduct rules; informing prisoner of release date; reentry parole and committed youthful offender parole.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

ARTICLE 82.

Probation.

§ 15A-1343. Conditions of probation.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When a person has been convicted of hunting, trapping, or fishing without the proper license or licenses, the judge may order the purchase of the proper license or licenses in lieu of a fine. The proper license or licenses consist, at the minimum, of the least expensive annual statewide license, or combination of such licenses, listed in G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272 and 113-272.2 that are required to engage lawfully in the specific activity or activities in which the defendant was engaged and constituting the basis of the offense of which he was convicted. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the

damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay. An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. As used herein, "restitution" shall mean compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action and the purchase of the proper license or licenses in lieu of a fine. As used herein, "reparation" shall include but not to be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein, "aggrieved party" shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local. Provided, that no government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs. A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done. Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess. 1984) amendment, effective retroactive to Oct. 1, 1983, added the present second and third sentences of subsection (d) and added "and the purchase of the proper license or licenses in lieu of a fine" at the end of the present seventh sentence of subsection (d).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

IV. RESTITUTION.

The constitutionality of a reparation requirement may only be considered if and when restitution is ordered. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

The constitutionality of a reparation requirement may only be determined by considering defendant's financial status at the time when restitution may be paid. Because restitution has not been imposed as a condition of parole or work release, there has been no equal protection violation here. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

A requirement that a defendant pay restitution as a condition of parole or work release is not inherently unconstitutional. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

Neither the Parole Commission nor the Department of Correction is bound by the judge's recommendation of restitution as a condition of parole or work release. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

§ 15A-1344.1. (For expiration date see note) Procedure to insure payment of child support.

(a) When the court requires, as a condition of supervised or unsupervised probation or suspended sentence, that a defendant support his children, the court may order at any time that support payments be made to the clerk of court for remittance to the party entitled to receive the payments.

(b) After entry of such an order by the court, the clerk of court shall maintain records listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order.

(c) The parties affected by the order shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order. The court may provide in the order that a defendant failing to inform the court of a change of address within reasonable period of time may be held in violation of probation.

(d) When a defendant fails to make required payments of child support, and is in arrears of said payments, the clerk of superior court may mail by regular mail to the last known address of the defendant a notice of delinquency which shall set out the amount of child support currently due and which shall demand immediate payment of said amount. The failure to receive said delinquency notice shall not be a defense in any probation violation hearing thereafter. If the arrearage is not paid in full within 21 days after the mailing of said notice, or is not paid within 30 days after the defendant becomes delinquent if the clerk has elected not to send a delinquency notice, the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A, or proceedings for activation of the suspended sentence, if the defendant is not on probation. (1983, c. 567, s. 1; 1983 (Reg. Sess., 1984), c. 1100, ss. 1, 2.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1100, s. 3, makes the act effective upon ratification and provides that it shall expire on June 1, 1985. The act was ratified July 6, 1984.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, inserted "or suspended sentence" in subsection (a) and added "or proceedings for activation of the suspended sentence, if the defendant is not on probation" at the end of subsection (d). For the expiration date of this amendment, see the Editor's note above.

§ 15A-1345. Arrest and hearing on probation violation.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Cunningham, 63 N.C. App. 470, 305 S.E.2d 193 (1983).

Article 83.

Imprisonment.

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

CASE NOTES

Fair Sentencing Act Did Not Remove Power to Impose Consecutive Sentences. — Although the General Assembly did not address the issue of consecutive sentences in the Fair Sentencing Act, § 15A-1340.1 et seq., it left substantially intact subsection (a) of this section, which vests the sentencing judge with discretion to impose either consecutive or concurrent sentences. Since subsection (a) of this section was in effect when the Legislature enacted the Fair Sentencing Act, the Legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Consecutive Sentencing Does Not Violate Fair Sentencing Act. — Leaving sentencing judges with unbridled discretion on the matter of whether to run multiple sentences concurrently or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, the Legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the Legislature, there is nothing inherent in consecutive sentencing which violates the Fair Sentencing Act, § 15A-1340.1 et seq. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Imposition of consecutive sentences for rape, first-degree sex offense, first-degree burglary and armed robbery violates neither the Fair Sentencing Act, § 15A-1340.1 et seq., nor any constitutional proportionality requirement. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

§ 15A-1355. Calculation of terms of imprisonment.

CASE NOTES

Cited in Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984).

Article 85.

Parole.

§ 15A-1371. Parole eligibility, consideration, and refusal.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of an intensive probation/parole officer, or a Community Penalties Program conducted under G.S. 143B-500 et seq., or a community service restitution program conducted under G.S. 143B-475(d). A parolee who is paroled under this subsection shall serve the remaining period of his active sentence by community service at the rate of one month's service for each 50 hours of community service completed, until

at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The supervisory official or agency shall develop a program of community service work for parolees paroled under this subsection, and any substantial violation without just cause of the rules and regulations imposed by such supervising official or agency shall be grounds for revocation of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving his first active sentence the term of which exceeds one year; and

(2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and

(3) Who agrees to complete service of his sentence as herein specified; and

(4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1098, s. 1.1, provides; "Nothing in this act shall obligate the General Assembly to appropriate additional funds."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (h).

CASE NOTES

Cited in Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984).

Article 85A.

Parole of Certain Convicted Felons.

§ 15A-1380.2. Reentry parole of felons.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of an intensive probation/parole officer, or a Community Penalties Program conducted under G.S. 143B-500 et seq., or a community service restitution program conducted under G.S. 143B-475(d). A parolee who is paroled under this subsection shall serve the remaining period of his active sentence by community service at the rate of one month's service for each 50 hours of community service completed, until at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The supervisory official or agency shall develop a program of community service work for parolees paroled under this subsection, and any substantial violation without just cause of the rules and regulations imposed by such supervising official or agency shall be grounds for revocation of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving his first active sentence the term of which exceeds one year; and

(2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and

(3) Who agrees to complete service of his sentence as herein specified; and

(4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner. (1979, c. 760, s. 4; 1981, c. 662, s. 5; 1983, c. 547; c. 557, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1098, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1098, s. 1.1, provides: "Nothing in this act shall obligate the General Assembly to appropriate additional funds."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (h).

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

CASE NOTES

Legal effect of arresting judgment is to vacate the verdict and sentence. The State may proceed against the defendants if it so desires, upon new and sufficient bills of indictment. State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Judgment must be arrested when indictment fails to charge essential element of the offense. State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Applied in State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

CASE NOTES

Applied in State v. Bean, — N.C. App. —, 310 S.E.2d 421 (1984); State v. Essick, — N.C. App. —, 314 S.E.2d 268 (1984).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

CASE NOTES

Showing Required for New Trial, etc. — In accord with original. See State v. Clark, 65 N.C. App. 286, 308 S.E.2d 913 (1983).

Applied in State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984).

Stated in State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983).

Cited in State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983); State v. Garner, — N.C. App. —, 313 S.E.2d 927 (1984).

§ 15A-1417. Relief available.

CASE NOTES

Applied in State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

§ 15A-1418. Motion for appropriate relief in the appellate division.

CASE NOTES

Applied in State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983); State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

Cited in State v. Johnson, 309 N.C. 459, 306 S.E.2d 770 (1983).

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

Applied in Richardson v. Turner, 716 F.2d 1059 (4th Cir. 1983).

§ 15A-1420. Motion for appropriate relief; procedure.

CASE NOTES

In an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion. The court must make findings of fact in support of its ruling. State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983).

In hearings before a judge sitting without a jury adherence to the rudimentary rules of evidence is desirable even in preliminary voir dire hearings. Such adherence invites confidence in the trial judge's findings. State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983).

Applied in State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Wise, 64 N.C. App.

108, 306 S.E.2d 569 (1983); State v. Blandford, — N.C. App. —, 311 S.E.2d 338 (1984); State v. Essick, — N.C. App. —, 314 S.E.2d 268 (1984).

§ 15A-1422. Review upon appeal.

CASE NOTES

Cited in State v. Garner, — N.C. App. —, 313 S.E.2d 927 (1984).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1443. Existence and showing of prejudice.

Legal Periodicals. —
For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983); State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983); State v. Moore, 309 N.C. 102, 305 S.E.2d 542 (1983); State v. Cope, 309 N.C. 47, 305 S.E.2d 676 (1983); State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983); State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983); State v. Jones, 64 N.C. App. 505, 307 S.E.2d 823 (1983); State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983); State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983); State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Smith, 310 N.C. 108, 310 S.E.2d 320 (1984); State v. Stanley, — N.C. —, 312 S.E.2d 482 (1984); State v. Colbert, 65 N.C. App. 762, 310 S.E.2d 145 (1984); State v. Godwin, — N.C. App. —, 314 S.E.2d 265 (1984); State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

Stated in State v. Stills, — N.C. —, 312 S.E.2d 443 (1984); State v. Dula, — N.C. App. —, 313 S.E.2d 899 (1984).

Cited in State v. Whisenant, 308 N.C. 791, 303 S.E.2d 784 (1983); State v. Rothwell, 308 N.C. 782, 303 S.E.2d 798 (1983); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); State v. Jean, — N.C. —, 311 S.E.2d 266 (1984); State v. Smith, — N.C. App. —, 312 S.E.2d 222 (1984); State v. Willis, — N.C. App. —, 313 S.E.2d 173 (1984).

§ 15A-1444. When defendant may appeal; certiorari.

CASE NOTES

Applied in State v. Jones, 309 N.C. 214, 306 S.E.2d 451 (1983); State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984).

Cited in State v. Miller, 64 N.C. App. 618, 307 S.E.2d 843 (1983); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983); State v. Smith, 65 N.C. App. 420, 309 S.E.2d 1 (1983); State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983); State v. Jones, — N.C. App. —, 311 S.E.2d 351 (1984); State v. Thompson, — N.C. App. —, 312 S.E.2d 212 (1984).

§ 15A-1445. Appeal by the State.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

Cited in State v. Adams, — N.C. App. —, 312 S.E.2d 498 (1984).

§ 15A-1446. Requisites for preserving the right to appellate review.

(b) Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal, but the appellate court may review such errors affecting substantial rights in the interest of justice if it determines it appropriate to do so.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 28; 1983 (Reg. Sess., 1984), c. 1037, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted "affecting substantial rights" in subsection (b).

Legal Periodicals. —

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

Applied in State v. Queen, 65 N.C. App. 820, 310 S.E.2d 153 (1984).

Quoted in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Stated in State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

Legal Periodicals. —

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For note discussing North Carolina's capital sentencing procedure, see 62 N.C.L. Rev. 833 (1984).

For note on jury discretion in capital cases in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982), see 5 Camp. L. Rev. 451 (1983).

For comment on limitations upon the jury's discretion in capital punishment sentencing in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), see 19 Wake Forest L. Rev. 621 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Constitutionality. —

In accord with 4th paragraph in original. See State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Subsection (d) of this section is not unconstitutional. State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

The United States Supreme Court says the federal Constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first-degree murder so long as such discretionary decisions are not based on race, religion, or some other impermissible classification, and the North Carolina Supreme Court is not inclined to interpret the Constitution to require more. If prosecutors are to be "guided" in the exercise of this kind of discretion, it is the province of the legislature and not the Court to so provide. State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

Death penalty statute does not violate constitutional right to privacy. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

For discussion of whether codefendants who are tried jointly should receive joint or separate sentencing trial, see State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Exchange of Jurors for Sentencing Phase Based on Their Convictions as to Death Penalty. — Subdivision (a)(2) of this section permits alternate jurors to serve during the sentencing phase in extraordinary circumstances involving the death, incapacitation or disqualification of an empaneled juror, but does not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Selecting a jury composed both of those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who are unopposed to the death penalty contravenes subdivision (a)(2) of this section, which contemplates that the same jury which determines guilt will recommend the sentence. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Applied in State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983); State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983); State v. Watson, — N.C. —, 312 S.E.2d 448 (1984); Keeten v. Garrison, 578 F. Supp. 1164 (W.D.N.C. 1984).

Stated in Hutchins v. Garrison, 724 F.2d 1425 (4th Cir. 1983).

Cited in State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983); State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984).

II. REVIEW OF JUDGMENT AND SENTENCE.

The language of subdivision (d)(2) of this section is mandatory. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The responsibility placed upon the State by subdivision (d)(2) is as serious as any responsibility placed upon an appellate court. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Purpose of Subsection (d). —

The purpose of proportionality review is to serve as a check against the capricious or random imposition of the death penalty. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

A proportionality review is to be undertaken only in cases where both phases of the trial of a defendant have been found to be without error. Only then can the court have before it the true decision of the jury to which great deference should be accorded. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

For discussion of proportionality review, see Solem v. Helm, — U.S. —, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The Supreme Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison. The court has chosen to use all of these "similar cases" for proportionality review purposes. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

"Finding" Required by Subdivision (d)(2). — Subdivision (d)(2) of this section requires the Supreme Court to determine, as a matter of law, whether (1) the record supports the jury's finding of any aggravating circumstance upon which the trial court based its sentence of death, (2) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases; it neither contemplates nor requires the court to make factual findings. State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

While subdivision (d)(2) of this section uses the word "finding" in prescribing the Supreme Court's review of death sentences, a "finding of fact" as that term is generally understood is not contemplated. Rather, "finding" means a "determination" or a "conclusion." State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

Pool of "Similar Cases" Used for Comparison. — In comparing "similar cases" for

purposes of proportionality review, the Supreme Court uses as a pool for comparison purposes all cases arising since the effective date of the capital punishment statute, June 1, 1977, which have been tried as capital cases and reviewed on direct appeal by the Supreme Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Citation to Every "Similar Case" Not Necessary. — The Supreme Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

Only Statutory Circumstances May Be Considered. — A jury considering the sentence in a capital case in North Carolina may consider only statutory aggravating circumstances. Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983).

Test of When Aggravating, etc. —

It is error to submit the underlying felony as an aggravating circumstance during the sentencing phase of the trial for a capital crime when felony murder is the theory under which defendant was convicted. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Need for Deterrence and That Lesser Sentence Would Depreciate Seriousness May Not Be Considered. — It is error for the trial judge to find as aggravating factors that the sentence imposed was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fall within the exclusive realm of the Legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to the character or conduct of the offender. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

B. Prior Convictions.

Methods of Proof. — Prior convictions may be proved by stipulation or by original certified copy of the court record, not that they must be. The statute does not preclude other methods of proof. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

E. Especially Heinous, Atrocious, or Cruel Act.

Propriety of Submitting, etc. —

To submit the aggravating factor under subdivision (e)(9) to a jury, the capital offense must not be merely heinous, atrocious, or cruel; it must be especially heinous, atrocious, or cruel. The defendant's acts must be characterized by excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in a first-degree murder case. State v. Stanley, — N.C. —, 312 S.E.2d 393 (1984).

And Is Not a "Catchall" Provision. —

In accord with original. See State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Not Limited to Physical Injury or Torture. — The North Carolina Supreme Court has declined to limit the interpretation of an especially heinous, atrocious, or cruel murder to one which involves only physical injury or torture prior to death or to physical injury alone in any event. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

That death is not instantaneous does not alone make a murder especially heinous, atrocious or cruel. State v. Stanley, — N.C. —, 312 S.E.2d 393 (1984).

Evidence of a victim's begging for his life is, like torture, one factor for jury consideration in determining whether a murder is especially heinous, atrocious, or cruel. However, it is not necessarily a determinative factor. Nor does this factor alone always necessitate a finding that a murder was especially heinous, atrocious, or cruel. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

IV. MITIGATING CIRCUMSTANCES.

A. In General.

The trial judge's determination of whether a mitigating circumstance should be submitted to the sentencing jury should be guided by the following statement of the State Supreme Court in State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, — U.S. —, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), reh. denied, — U.S. —, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983): Common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the first sentencing hearing. State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

Burden on Issue, etc. —

The burden of persuading the jury as to the existence of any mitigating circumstance is upon the defendant to so prove by a preponderance of the evidence, and when all the

evidence tends to show the existence of a particular mitigating circumstance, a defendant is entitled to a peremptory instruction on that issue. State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

F. Age of Defendant.

Chronological age of a defendant is not the determinative factor under subdivision (f)(7) of this section. Relevant to this inquiry is not only the chronological age of the defendant, but also his experience, criminal tendencies, and presumably the rehabilitative aspects of his character. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Any hard and fast rule as to age would tend to defeat the ends of justice, so the term "youth" must be considered as relative and this factor weighed in the light of varying conditions and circumstances. It is well known that two young persons may vary greatly in mental and physical development, experience and criminal tendencies (citation omitted). One of these factors may have greater significance than the others in some cases, depending on the circumstances. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

§ 15A-2001. Capital offenses; plea of guilty.

Legal Periodicals. —

For note on jury discretion in capital cases in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982), see 5 Camp. L. Rev. 451 (1983).

§ 15A-2002. Capital offenses; jury verdict and sentence.

Legal Periodicals. — For note on jury discretion in capital cases in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982), see 5 Camp. L. Rev. 451 (1983).

Chapter 15B.

Victims Compensation.

§ 15B-1. Short title.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

Chapter 17.

Habeas Corpus.

Article 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

§ 17C-1. Findings and policy.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

Chapter 17D.

North Carolina Justice Academy.

§ 17D-1. Definitions.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

Chapter 18B.

Regulation of Alcoholic Beverages.

Article 2.

State Administration.

Sec.
18B-200. (Effective July 1, 1985) North Carolina Alcoholic Beverage Control Commission.

Article 9.

Issuance of Permits.

Sec.
18B-900. Qualifications for permit.

Article 1.

General Provisions.

§ 18B-102. Manufacture, sale, etc., forbidden except as expressly authorized.

CASE NOTES

Quoted in Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584 (1983).

Article 1A.

Compensation for Injury Caused by Sales to Underage Persons.

§ 18B-121. Claim for relief created for sale to underage person.

CASE NOTES

Quoted in Freeman v. Finney, 65 N.C. App. 526, 309 S.E.2d 531 (1983).

§ 18B-122. Burden of proof and admissibility of evidence.

CASE NOTES

Violation of Former § 18A-8 Was Negligence Per Se. Freeman v. Finney, 65 N.C. App. 526, 309 S.E.2d 531 (1983).

Article 2.

State Administration.

§ 18B-200. (Effective July 1, 1985) North Carolina Alcoholic Beverage Control Commission.

(a) Creation of Commission; compensation. — The North Carolina Alcoholic Beverage Control Commission is created to consist of a chairman and two associate members. The chairman shall devote his full time to his official duties and receive a salary fixed by the General Assembly in the Current Operations Appropriations Act. The associate members shall be compensated for per diem, subsistence and travel as provided in Chapter 138 of the General Statutes.

(b) Appointment of Members. — Members of the Commission shall be appointed by the Governor to serve at his pleasure.

(c) Vacancy. — The Governor shall fill any vacancy on the Commission by appointing a successor to serve at the Governor's pleasure. If the chairman's seat becomes vacant, the Governor may designate either the new member or an existing member of the Commission as the chairman.

(d) Employees. — The Commission may authorize the chairman to employ, discharge, and otherwise supervise subordinate personnel of the Commission. The Commission shall appoint at least one hearing officer with authority to make investigations, hold hearings, and perform any other duties authorized by Chapter 150A. (1937, c. 49, ss. 2, 3; c. 411; 1939, c. 185, s. 5; 1941, c. 107, s. 5; 1963, c. 916, s. 1; 1965, c. 1102, ss. 1, 2; 1969, c. 294, ss. 1, 2; 1971, c. 872, s. 1; 1979, c. 336; 1981, c. 412, s. 2; 1983, c. 717, s. 4; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 3.

Sale, Possession, and Consumption.

§ 18B-305. Other prohibited sales.

CASE NOTES

Quoted in Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584 (1983).

Article 4.

Transportation.

§ 18B-401. Manner of transportation.

CASE NOTES

Cited in State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983).

Article 7.

Local ABC Boards.

§ 18B-700. Appointment and organization of local ABC boards.

Local Modification. — Moore County: 1983 (Reg. Sess., 1984), c. 957; Wake County: 1983 (Reg. Sess., 1984), c. 1040; Durham: 1983 (Reg. Sess., 1984), c. 1116.

§ 18B-701. Powers of local ABC boards.

CASE NOTES

ABC board has authority to construct buildings in which to carry out its duties. Waters v. Biesecker, 309 N.C. 165, 305 S.E.2d 539 (1983).

The ABC board is not required to construct buildings; it has authority to purchase or lease buildings for use as ABC stores. Waters v. Biesecker, 309 N.C. 165, 305 S.E.2d 539 (1983).

Article 9.

Issuance of Permits.

§ 18B-900. Qualifications for permit.

(a) Requirements. — To be eligible to receive and to hold an ABC permit, a person shall:

(1) Be at least 21 years old, unless the person is a manager of a business selling only malt beverages and unfortified wine, in which case the person shall be at least 19 years old;

(2) Be a resident of North Carolina unless:

a. He is an officer, director or stockholder of a corporate applicant or permittee and is not a manager or otherwise responsible for the day-to-day operation of the business; or

b. He has executed a power of attorney designating a qualified resident of this State to serve as attorney in fact for the purposes of receiving service of process and managing the business for which permits are sought; or

c. He is applying for a nonresident malt beverage vendor permit, a nonresident wine vendor permit, or a vendor representative permit;

(3) Not have been convicted of a felony within three years, and, if convicted of a felony before then, shall have had his citizenship restored;
(4) Not have been convicted of an alcoholic beverage offense within two years;
(5) Not have been convicted of a misdemeanor controlled substance offense within two years; and
(6) Not have had an alcoholic beverage permit revoked within three years.
(7) Not have, whether as an individual or as an officer, director, shareholder or manager of a corporate permittee, an unsatisfied outstanding final judgment that was entered against him in an action under Article 1A of this Chapter."

To avoid undue hardship, however, the Commission may decline to take action under G.S. 18B-104 against a permittee who is in violation of subdivisions (3), (4), or (5).

(1949, c. 974, ss. 1, 2; 1963, c. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2; c. 1012; 1975, c. 19, s. 5; 1977, c. 70, s. 19.1; c. 668, s. 3; c. 977, ss. 1, 2; 1979, c. 286, s. 4; 1981, c. 412, s. 2; c. 747, ss. 53, 54; 1981 (Reg. Sess., 1982), c. 1262, ss. 13, 14; 1983, c. 435, ss. 32, 39.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. —

Subsection (a) of this section is set out to correct an error in subdivision (a)(5) in the Replacement Volume.

Chapter 20.

Motor Vehicles.

Article 1.

Division of Motor Vehicles.

Sec.

20-2. (Effective July 1, 1985) Commissioner of Motor vehicles.

20-4.01. Definitions.

Article 2.

Uniform Driver's License Act.

20-13. Suspension of license of provisional licensee.

20-16. Authority of Divison to suspend license.

20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.

20-16.4. Revocation for failure to complete Alcohol and Drug Education Traffic School.

20-16.5. Immediate civil license revocation for certain persons charged with implied-consent offenses.

20-19. Period of suspension or revocation.

20-28. Unlawful to drive while license suspended or revoked.

20-28.2. Forfeiture of motor vehicle for impaired driving after impaired driving license revocation.

Article 2B.

Special Identification Cards for Nonoperators.

20-37.7. Special identification card.

Article 3.

Motor Vehicle Act of 1937.

Part 5. Issuance of Special Plates.

20-80.1. Military Reserve license plates.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

Sec.

20-118. Weight of vehicles and load.

Part 10. Operation of Vehicles and Rules of the Road.

20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

Part 12. Sentencing; Penalties.

20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

20-179.3. Limited driving privilege.

20-179.4. Community service alternative punishment; responsibilities of the Department of Crime Control and Public Safety; fee.

Article 4.

State Highway Patrol.

20-187.3. Quotas prohibited.

Article 13.

The Vehicle Financial Responsibility Act of 1957.

20-309. (Effective September 15, 1984) Financial responsibility prerequisite to registration; must be maintained throughout registration period.

20-311. (Effective September 15, 1984) Revocation of registration when financial responsibility not in effect.

Article 1.

Division of Motor Vehicles.

§ 20-2. (Effective July 1, 1985) Commissioner of Motor Vehicles.

The Division of Motor Vehicles shall be administered by the Commissioner of Motor Vehicles, who shall be appointed by and serve at the pleasure of the Secretary of the Department of Transportation. The Commissioner shall be paid an annual salary to be fixed by the General Assembly in the Current Operations Appropriations Act and allowed his traveling expenses as allowed by law.

In any action, proceeding, or matter of any kind, to which the Commissioner of Motor Vehicles is a party or in which he may have an interest, all pleadings, legal notices, proof of claim, warrants for collection, certificates of tax liability, executions, and other legal documents, may be signed and verified on behalf of the Commissioner of Motor Vehicles by the Assistant Commissioner of Motor Vehicles or by any director or assistant director of any section of the Division of Motor Vehicles or by any other agent or employee of the Division so authorized by the Commissioner of Motor Vehicles. (1941, c. 36, s. 2; 1945, c. 527; 1955, c. 472; 1975, c. 716, s. 5; 1983, c. 717, s. 5; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

§ 20-4.01. Definitions.

Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

(3a) Chemical Analysis. — A test of the breath or blood of a person to determine his alcohol concentration, performed in accordance with G.S. 20-139.1. The term "chemical analysis" includes duplicate or sequential analyses when necessary or desirable to insure the integrity of test results.

(24) Nonresident. — Any person whose legal residence is in some state, territory, or jurisdiction other than North Carolina or in a foreign country.

(31a) Provisional Licensee. — A person under the age of 18 years.

(32) Public Vehicular Area. — Any area within the State of North Carolina that is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of:

a. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions; or

b. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public; or

c. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13.)

The term "public vehicular area" shall also include any beach area used by the public for vehicular traffic as well as any road opened to vehicular traffic within or leading to a subdivision for use by subdivision residents, their guests, and members of the public, whether or not the subdivision roads have been offered for dedication to the public. The term "public vehicular area" shall not be construed to mean any private property not generally open to and used by the public.

(1973, c. 1330, s. 1; 1975, cc. 94, 208; c. 716, s. 5; c. 743; c. 859, s. 1; 1977, c. 313; c. 464, s. 34; 1979, c. 39; c. 423, s. 1; c. 574, ss. 1-4; c. 667, s. 1; c. 680; 1981, c. 606, s. 3; c. 792, s. 2; 1983, c. 435, s. 8; 1983 (Reg. Sess., 1984), c. 1101, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1101, s. 38, makes ss. 3, 8, 13, 16, 22, 23, 34, 35 and 36 of the act effective October 1, 1984, and the remaining sections, except as provided in s. 37, effective upon ratification. Section 37 sets out special provisions with regard to s. 32, which amends § 20-179.3. The act was ratified July 6, 1984.

Subdivision (24) is set out above to correct an error in the Replacement Volume.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1101, ss. 1 and 2, effective July 6, 1984, substituted "A test" for "A chemical test" at the beginning of subdivision (3a) and insert "for vehicular traffic" following "generally open to and used by the public" in the introductory language of subdivision (32).

The 1983 (Reg. Sess., 1984) amendent by c. 1101, s. 3, effective October 1, 1984, added subsection (31a).

CASE NOTES

Emergency strip adjacent to interstate highways falls within the literal language of the definition of "highway" as contained in this section. State v. Kelley, 65 N.C. App. 159, 308 S.E.2d 720 (1983).

One who does not hold legal title to a vehicle cannot obtain owners liability insurance thereon. Nationwide Mut. Ins. Co. v. Edwards, — N.C. App. —, 312 S.E.2d 656 (1984).

Applied in State v. Bowen, — N.C. App. —, 313 S.E.2d 196 (1984).

OPINION OF ATTORNEY GENERAL

The parking lot of the restaurant is within the definition of "public vehicular area" under subdivision (32) of this section when the restaurant is closed. See opinion of Attorney General to Mr. James C. Yeatts, III, Assistant District Attorney, 17-B Judicial District, 52 N.C.A.G. 6 (1982).

Article 2.

Uniform Driver's License Act.

§ 20-13. Suspension of license of provisional licensee.

(a) The Division may suspend, after providing an opportunity for a preliminary hearing, the operator's license of a provisional licensee upon receipt of notice of the licensee's conviction of a motor vehicle moving violation, in accordance with subsection (b), if the offense was committed while the person was still a provisional licensee. As used in this section, the phrase "motor vehicle moving violation" does not include the offenses listed in the third paragraph of G.S. 20-16(c) for which no points are assessed, nor does it include equipment violations specified in Part 9 of Article 3 of this Chapter.

(1963, c. 968, s. 1; 1965, c. 897; 1967, c. 295, s. 1; 1971, c. 120, ss. 1, 2; 1973, c. 439; 1975, c. 716, s. 5; 1979, c. 555, s. 1; 1983, c. 538, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1101, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, deleted the former second sentence of subsection (a), which read "A provisional licensee is a licensee who is under 18 years of age."

§ 20-16. Authority of Division to suspend license.

(a) The Division shall have authority to suspend the license of any operator after providing an opportunity for preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(1) to (4) Repealed by Session Laws 1979, c. 36;

(5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;

(6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;

(8) Has been convicted of illegal transportation of alcoholic beverages;

(8a) Has been convicted of impaired instruction under G.S. 20-12.1;

(8b) Has violated on a military installation a regulation of that installation prohibiting conduct substantially equivalent to conduct that constitutes impaired driving under G.S. 20-138.1 and, as a result of that violation, has had his privilege to drive on that installation revoked or suspended after an administrative hearing authorized by the commanding officer of the installation and that commanding officer has general court martial jurisdiction;

(9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;

(10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;

(10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or

(11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator not operate a motor vehicle for a period of time.

(1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2; 1953, c. 450; 1955, c. 1152, s. 15; c. 1187, ss. 9-12; 1957, c. 499, s. 1; 1959, c. 1242, ss. 1-2; 1961, c. 460, ss. 1, 2(a); 1963, c. 1115; 1965, c. 130; 1967, c. 16; 1971, c. 234, ss. 1, 2; c. 793, ss. 1, 2; c. 1198, ss. 1, 2; 1973, c. 17, ss. 1, 2; 1975, c. 716, s. 5; 1977, c. 902, s. 1; 1979, c. 36; c. 667, ss. 18, 41; 1981, c. 412, s. 4; c. 747, ss. 33, 66; 1981 (Reg. Sess., 1982), c. 1256; 1983, c. 435, s. 10; c. 538, ss. 3-5; c. 798; 1983 (Reg. Sess., 1984), c. 1101, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, deleted "or has been convicted under G.S. 18B-302(e) or (f) of fraudulent use of a driver's license to obtain alcoholic beverages" at the end of subdivision (a)(8).

CASE NOTES

I. IN GENERAL.

Applied in Belk v. Peters, 63 N.C. App. 196, 303 S.E.2d 641 (1983).

§ 20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.

(d) Consequences of Refusal; Right to Hearing before Division; Issues. — Upon receipt of a properly executed affidavit required by subsection (c), the Division must expeditiously notify the person charged that his license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. If the person properly requests a hearing, he retains his license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws his request, or he fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents he deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if he makes the request in writing at least three days before the hearing. The person may subpoena any other witness he deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

(1) The person was charged with an implied-consent offense;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of his rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions (1), (2), (4), or (5) is not met, it must rescind the revocation. If it finds that conditions (3) is alleged in the affidavit but is not met, it must order the revocation sustained if that is the only condition that is not met; in this instance subsection (d1) does not apply to that revocation. If the revocation is sustained, the person must surrender his license immediately upon notification by the Division.

(e1) Limited Driving Privilege after Six Months in Certain Instances. — A person whose driver's license has been revoked under this section may apply for and a judge authorized to do so by this subsection may issue a limited driving privilege if:

(1) At the time of the refusal he held either a valid driver's license or a license that had been expired for less than one year;

(2) At the time of the refusal, he had not within the preceding seven years been convicted of an offense involving impaired driving;

(3) At the time of the refusal, he had not in the preceding seven years willfully refused to submit to a chemical analysis under this section;

(4) The implied-consent offense charged did not involve death or critical injury to another person;

(5) The underlying charge for which the defendant was requested to submit to a chemical analysis has been finally disposed of:

a. Other than by conviction; or

b. By a conviction of impaired driving under G.S. 20-138.1, at a punishment level authorizing issuance of a limited driving privilege under G.S. 20-179.3(b), and he has complied with at least one of the mandatory conditions of probation listed for the punishment level under which he was sentenced;

(6) Subsequent to the refusal he has had no unresolved pending charges for or additional convictions of an offense involving impaired driving; and

(7) His license has been revoked for at least six months for the refusal.

Except as modified in this subsection, the provisions of G.S. 20-179.3 relating to the procedure for application and conduct of the hearing and the restrictions required or authorized to be included in the limited driving privilege apply to applications under this subsection. If the case was finally disposed of in the district court, the hearing must be conducted in the district in which the refusal occurred by a district court judge. If the case was finally disposed of in the superior court, the hearing must be conducted in the district in which the refusal occurred by a superior court judge. A limited driving privilege issued under this section authorizes a person to drive if his license is revoked solely under this section or solely under this section and G.S. 20-17(2). If the person's license is revoked for any other reason, the limited driving privilege is invalid.

(i) Right to Chemical Analysis before Arrest or Charge. — A person stopped or questioned by a law-enforcement officer who is investigating whether the person may have committed an implied-consent offense may request the administration of a chemical analysis before any arrest or other charge is made for the offense. Upon this request, the officer must afford the person the opportunity to have a chemical analysis of his breath, if available, in accordance with the procedures required by G.S. 20-139.1(b). The request constitutes the person's consent to be transported by the law-enforcement officer to the place where the chemical analysis is to be administered. Before the chemical analysis is made, the person must confirm his request in writing and he must be notified:

(1) That the test results will be admissible in evidence and may be used against him in any implied-consent offense that may arise;

(2) That his license will be revoked for at least 10 days if the test reveals an alcohol concentration of 0.10 or more; and

(3) That if he fails to comply fully with the test procedures, the officer may charge him with any offense for which the officer has probable cause, and if he is charged with an implied-consent offense, his refusal to submit to the testing required as a result of that charge would result in revocation of his driver's license. The results of the chemical analysis are admissible in evidence in any proceeding in which they are relevant. (1963, c. 966, s. 1; 1965, c. 1165; 1969, c. 1074, s. 1; 1971, c. 619, ss. 3-6; 1973, c. 206, ss. 1, 2; cc. 824, 914; 1975, c. 716, s. 5; 1977, c. 812; 1979, c. 423, s. 2; 1979, 2nd Sess., c. 1160; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 87; c. 435, s. 11; 1983 (Reg. Sess., 1984), c. 1101, ss. 5-8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1101, s. 38, makes ss. 3, 8, 13, 16, 22, 23, 34, 35 and 36 of the act effective October 1, 1984, and the remaining sections, except as provided in s. 37, effective upon ratification.

Section 37 sets out special provisions with regard to s. 32, which amends § 20-179.3. The act was ratified July 6, 1984.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1101, ss. 5-7, effective July 6, 1984, inserted the present third sentence of subsection (d), inserted the present sixth sentence of subsection (d), substituted "and must be limited" for "under the provisions for hearings held under G.S. 20-16(d), except that the hearing is limited" in the present seventh sentence of subsection (d), substituted the present ninth and tenth sentences for a former seventh sentence, which read "If the Division finds that any of the conditions is not met, it must rescind the revocation," rewrote subdivision (e1)(1), which read "At the time of the refusal, the applicant held a valid driver's license," and substituted "seven years" for "10 years" in subdivision (e1)(2) and (e1)(3).

The 1983 (Reg. Sess., 1984) amendment by c. 1101, s. 8, effective October 1, 1984, rewrote the second sentence of subsection (i), which read "Upon this request, the officer must afford the person the opportunity to have a chemical analysis, if available, upon the procedures applicable had the person been charged," and substituted the present fourth sentence of subsection (i) with its subdivision (1) through (3) for a former fourth sentence, which read "Before the chemical analysis is made, the person must sign a form, to be supplied by the Division, confirming his request."

§ 20-16.4. Revocation for failure to complete Alcohol and Drug Education Traffic School.

(b) Right of Notification and Hearing. — Upon receipt of a properly executed notice of failure from the school, the Division must expeditiously notify the person that his license is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. If the person properly requests a hearing, he retains his license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or he fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents he deems necessary. The person may request the hearing officer to subpoena the appropriate school personnel to appear in person at the hearing if he makes the request in writing at least three days before the hearing. The person may subpoena any other witness he deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section.

(c) Hearing Procedures; Issues. — The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing must be conducted in the county where the school is located, and must be limited to consideration of whether:

(1) The person was validly assigned to the school by a court;

(2) The person failed to complete the course of instruction successfully; and

(3) The failure was willful.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions is not met, it must rescind the revocation. If the revocation is sustained, the person must surrender his license immediately upon notification by the Division. The person may file a petition in superior court for a de novo review of the issues listed in this section, in the same manner and under the same conditions as provided in G.S. 20-25, except that the hearing must be held in the judicial district in which the school is located.

(1983, c. 435, s. 13; 1983 (Reg. Sess., 1984), c. 1101, ss. 9, 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, inserted the present third sentence of subsec-

tion (b), inserted the present first sentence of subsection (c), and in the present second sentence of subsection (c) substituted "and must be" for "under the provisions for hearings held under G.S. 20-16(d), except that the hearing is."

§ 20-16.5. Immediate civil license revocation for certain persons charged with implied-consent offenses.

(a) Definitions. — As used in this section the following words and phrases have the following meanings:

(1) Charging Officer. — As described in G.S. 20-16.2(a1).

(2) Clerk. — As defined in G.S. 15A-101(2).

(3) Judicial Official. — As defined in G.S. 15A-101(5).

(4) Revocation Report. — A sworn statement by a charging officer and a chemical analyst containing facts indicating that the conditions of subsection (b) have been met. When one chemical analyst analyzes a person's blood and another chemical analyst informs a person of his rights and responsibilities under G.S. 20-16.2, the report must include the statements of both analysts.

(5) Surrender of a Driver's License. — The act of turning over to a court or a law enforcement officer the person's most recent, valid driver's license or learner's permit issued by the Division or by a similar agency in another jurisdiction, or a limited driving privilege issued by a North Carolina court. A person who is validly licensed but who is unable to locate his license card may file an affidavit with the clerk setting out facts that indicate that he is unable to locate his license card and that he is validly licensed; the filing of the affidavit constitutes a surrender of the person's license.

(b) Revocations for Persons Who Refuse Chemical Analyses or Have Alcohol Concentrations of 0.10 or More. — A person's driver's license is subject to revocation under this section if:

(1) A charging officer has reasonable grounds to believe that the person has committed an offense subject to the implied-consent provisions of G.S. 20-16.2;

(2) The person is charged with that offense as provided in G.S. 20-16.2(a);

(3) The charging officer and the chemical analyst comply with the procedures of G.S. 20-16.2 and G.S. 20-139.1 in requiring the person's submission to or procuring a chemical analysis; and

(4) The person:

a. Willfully refuses to submit to the chemical analysis; or

b. Has an alcohol concentration of 0.10 or more within a relevant time after the driving.

(b1) Precharge Test Results as Basis for Revocation. — Notwithstanding the provisions of subsection (b), a person's driver's license is subject to revocation under this section if:

(1) He requests a precharge chemical analysis pursuant to G.S. 20-16.2(i); and

(2) He has, at any relevant time after the driving, an alcohol concentration of 0.10 or more; and

(3) He is charged with an implied-consent offense.

(c) Duty of Charging Officers and Chemical Analysts to Report to Judicial Officials. — If a person's driver's license is subject to revocation under this section, the charging officer and the chemical analyst must execute a revocation report. If the person has refused to submit to a chemical analysis, a copy of the affidavit to be submitted to the Division under G.S. 20-16.2(c) may be substituted for the revocation report if it contains the information required by

this section. It is the specific duty of the charging officer to make sure that the report is expeditiously filed with a judicial official as required by this section.

(e) Procedure if Report Filed with Judicial Official When Person Is Present. — If a properly executed revocation report concerning a person is filed with a judicial official when the person is present before that official, the judicial official must, after completing any other proceedings involving the person, determine whether there is probable cause to believe that each of the conditions of subsection (b) has been met. If he determines that there is such probable cause, he must enter an order revoking the person's driver's license for the period required in this subsection. The judicial official must order the person to surrender his license and if necessary may order a law-enforcement officer to seize the license. The judicial official must give the person a copy of the revocation order. In addition to setting it out in the order the judicial official must personally inform the person of his right to a hearing as specified in subsection (g), and that his license remains revoked pending the hearing. Unless the person is not currently licensed, the revocation under this subsection begins at the time the revocation order is issued and continues until the person's license has been surrendered for 10 days and the person has paid the applicable costs. If the person is not currently licensed, the revocation continues until 10 days from the date the revocation order is issued and the person has paid the applicable costs. If within five working days of the effective date of the order, the person does not surrender his license or demonstrate that he is not currently licensed, the clerk must immediately issue a pick-up order. The pick-up order under this subsection may be issued by the clerk to any law-enforcement officer to pick up the person's driver's license in accordance with G.S. 20-29 as if the pick-up order had been issued by the Division.

(g) Hearing before Magistrate or Judge if Person Contests Validity of Revocation. — A person whose license is revoked under this section may request in writing a hearing to contest the validity of the revocation. The request may be made at the time of the person's initial appearance, or within 10 days of the effective date of the revocation to the clerk or a magistrate designated by the clerk, and may specifically request that the hearing be conducted by a district court judge. The Administrative Office of the Courts must develop a hearing request form for any person requesting a hearing. Unless a district court judge is requested, the hearing must be conducted within the county by a magistrate assigned by the chief district judge to conduct such hearings. If the person requests that a district court judge hold the hearing, the hearing must be conducted within the judicial district by a district court judge assigned to conduct such hearings. The revocation remains in effect pending the hearing, but the hearing must be held within three working days following the request if the hearing is before a magistrate or within five working days if the hearing is before a district court judge. The request for the hearing must specify the grounds upon which the validity of the revocation is challenged and the hearing must be limited to the grounds specified in the request. A witness may submit his evidence by affidavit unless he is subpoenaed to appear. Any person who appears and testifies is subject to questioning by the judicial official conducting the hearing, and the judicial official may adjourn the hearing to seek additional evidence if he is not satisfied with the accuracy or completeness of evidence. The person contesting the validity of the revocation may, but is not required to, testify in his own behalf. Unless contested by the person requesting the hearing, the judicial official may accept as true any matter stated in the revocation report. If any relevant condition under subsection (b) is contested, the judicial official must find by the greater weight of the evidence that the condition was met in order to sustain the revocation. At the conclusion of the hearing the judicial official must enter an order sustaining or rescinding the revocation. The judicial official's findings are without prejudice to the

person contesting the revocation and to any other potential party as to any other proceedings, civil or criminal, that may involve facts bearing upon the conditions in subsection (b) considered by the judicial official. The decision of the judicial official is final and may not be appealed in the General Court of Justice. If the hearing is not held and completed within three working days of the written request for a hearing before a magistrate or within five working days of the written request for a hearing before a district court judge, the judicial official must enter an order rescinding the revocation, unless the person contesting the revocation contributed to the delay in completing the hearing. If the person requesting the hearing fails to appear at the hearing or any rescheduling thereof after having been properly notified, he forfeits his right to a hearing.

(h) Return of License. — After the applicable period of revocation under this section, or if the magistrate or judge orders the revocation rescinded, the person whose license was revoked may apply to the clerk for return of his surrendered license. Unless the clerk finds that the person is not eligible to use the surrendered license, he must return it if:

(1) The applicable period of revocation has passed and the person has tendered payment for the costs under subsection (j); or

(2) The magistrate or judge has ordered the revocation rescinded.

If the license has expired, he may return it to the person with a caution that it is no longer valid. Otherwise, if the person is not eligible to use the license and the license was issued by the Division or in another state, the clerk must mail it to the Division. If the person has surrendered his copy of a limited driving privilege and he is no longer eligible to use it, the clerk must make a record that he has withheld the limited driving privilege and forward that record to the clerk in the county in which the limited driving privilege was issued for filing in the case file. If the person's license is revoked under this section and under another section of this Chapter, the clerk must surrender the license to the Division if the revocation under this section can terminate before the other revocation; in such cases, the costs required by subsection (j) must still be paid before the revocation under this section is terminated.

(1983, c. 435, s. 14; 1983 (Reg. Sess., 1984), c. 1101, ss. 11-17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1101, s. 38, makes ss. 3, 8, 13, 16, 22, 23, 34, 35 and 36 of the act effective October 1, 1984, and the remaining sections, except as provided in s. 37, effective upon ratification. Section 37 sets out special provisions with regard to s. 32, which amends § 20-179.3. The act was ratified July 6, 1984.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1101, ss. 11, 12, 14, 15 and 17, effective July 6, 1984, added the last sentence of subdivision (a)(5), substituted "A charging officer" for "a law-enforcement officer" at the beginning of subdivision (b)(1), rewrote the second sentence of subsection (c), added the last two sentences of subsection (e) and added the last sentence of subsection (h).

The 1983 (Reg. Sess., 1984) amendment by c. 1101, ss. 13 and 16, effective October 1, 1984, added subsection (b1) and in subsection (g) substituted "within 10 days of the effective date of the revocation" for "at any later time" in the second sentence, added "and the hearing must be limited to grounds specified in the request" at the end of the seventh sentence, and added the last sentence.

§ 20-19. Period of suspension or revocation.

(d) When a person's license is revoked under subdivision (2) of G.S. 20-17 and the person has another offense involving impaired driving for which he has been convicted, which offense occurred within three years immediately preceding the date of the offense for which his license is being revoked, the period of revocation is four years, and this period may be reduced only as

provided in this section. The Division may conditionally restore the person's license after it has been revoked for at least two years under this subsection if he provides the Division with satisfactory proof that:

(1) He has not in the period of revocation been convicted in North Carolina or any other state or federal jurisdiction of a motor vehicle offense, an alcoholic beverage control law offense, a drug law offense, or any other criminal offense involving the possession or consumption of alcohol or drugs; and

(2) He is not currently an excessive user of alcohol or drugs.

If the Division restores the person's license, it may place reasonable conditions or restrictions on the person for the duration of the original revocation period.

(e) When a person's license is revoked under subdivision (2) of G.S. 20-17 and the person has two or more previous offenses involving impaired driving for which he has been convicted, and the most recent offense occurred within the five years immediately preceding the date of the offense for which his license is being revoked, the revocation is permanent. The Division may, however, conditionally restore the person's license after it has been revoked for at least three years under this subsection if he provides the Division with satisfactory proof that:

(1) In the three years immediately preceding the person's application for a restored license, he has not been convicted in North Carolina or in any other state or federal court of a motor vehicle offense, an alcohol beverage control law offense, a drug law offense, or any criminal offense involving the consumption of alcohol or drugs; and

(2) He is not currently an excessive user of alcohol or drugs.

If the Division restores the person's license, it may place reasonable conditions or restrictions on the person for any period up to three years from the date of restoration.

(j) The Division is authorized to issue amended revocation orders issued under subsections (d) and (e), if necessary because convictions do not respectively occur in the same order as offenses for which the license may be revoked under those subsections. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4; 1953, c. 1138; 1955, c. 1187, ss. 13, 17, 18; 1957, c. 499, s. 2; c. 515, s. 1; 1959, c. 1264, s. 11A; 1969, c. 242; 1971, c. 619, ss. 8-10; 1973, c. 1445, ss. 1-4; 1975, c. 716, s. 5; 1979, c. 903, ss. 4-6; 1981, c. 412, s. 4; c. 747, ss. 34, 66; 1983, c. 435, s. 17; 1983 (Reg. Sess., 1984), c. 1101, s. 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, substituted "another offense involving impaired driving for which he has been convicted, which offense occurred within three years" for "another conviction of an offense involving impaired driving, occurring within the three years" near the beginning of the first sentence of subsection (d), substituted "previous offenses involving impaired driving for which he has been convicted, and the most recent offense" for "previous conviction of an offense involving impaired driving, and the most recent conviction" near the beginning of the first sentence of subsection (e), and added subsection (j).

§ 20-25. Right of appeal to court.

CASE NOTES

Cited in Gaither v. Peters, 63 N.C. App. 559, 305 S.E.2d 763 (1983).

§ 20-28. Unlawful to drive while license suspended or revoked.

(a1) A person convicted under subsection (a) shall be punished as if he had been convicted of driving without a driver's license under G.S. 20-7 if he demonstrates to the court that:

(1) At the time of the offense, his license was revoked solely under G.S. 20-16.5; and

(2) a. The offense occurred more than 30 days after the effective date of a revocation order issued under G.S. 20-16.5(f) and the period of revocation was 30 days as provided under subdivision (3) of that subsection; or

b. The offense occurred more than 10 days after the effective date of the revocation order issued under any other provision of G.S. 20-16.5.

In addition, a person punished under this subsection shall be treated for driver's license and insurance rating purposes as if he had been convicted of driving without a license under G.S. 20-7, and the conviction report sent to the Division must indicate that the person is to be so treated.

(1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16; 1955, c. 1020, s. 1; c. 1152, s. 18; c. 1187, s. 20; 1957, c. 1046; 1959, c. 515; 1967, c. 447; 1973, c. 47, s. 2; cc. 71, 1132; 1975, c. 716, s. 5; 1979, c 377, ss. 1, 2; c. 667, s. 41; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 51; 1983 (Reg. Sess., 1984), c. 1101, s. 18A.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (a1).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Beasley, — N.C. App. —, 311 S.E.2d 347 (1984).

Cited in State v. Gooden, 65 N.C. App. 669, 309 S.E.2d 707 (1983).

§ 20-28.1. Conviction of moving offense committed while driving during period of suspension or revocation of license.

Editor's Note. — The above catchline has been set out at the direction of the Revisor of Statutes to reflect a change necessitated by the amendment to the section made by Session Laws 1979, c. 378, s. 2.

§ 20-28.2. Forfeiture of motor vehicle for impaired driving after impaired driving license revocation.

(a) Meaning of "Impaired Driving License Revocation". — The revocation of a person's driver's license is an impaired driving license revocation if the revocation is pursuant to:

(1) G.S. 20-13.2, 20-16(a)(8b), 20-16.2, 20-16.4, 20-16.5, 20-17(2), or 20-17.2; or

(2) G.S. 20-16(a)(7), 20-17(1), or 20-17(9), if the offense involves impaired driving.

(1983, c. 435, s. 21; 1983 (Reg. Sess., 1984), c. 1101, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, substituted "G.S. 20-16(a)(7)" for "G.S. 20-16(7)" in subdivision (a)(2).

Article 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card.

(a) The Division of Motor Vehicles shall upon satisfactory proof of identification issue a special identification card to any person 11 years or older who is a resident of the State of North Carolina.

(b) Every application for a special identification card shall be made on the approved form furnished by the Division and shall be accompanied by a birth certificate and other proof of identification which shall be returned when the special identification card is issued.

(d) A special identification card issued under this section shall expire on the birth date of the holder in the fourth year of issuance. The fee for the issuance or reissuance of a special identification card shall be five dollars ($5.00) which shall be placed in the Highway Fund; provided that a special identification card may be issued without fee to a resident of North Carolina who is legally blind or has attained the age of 70 years; provided further that the fees collected for the issuance of special identification cards to persons under the age of 16 shall be placed in a reserve fund to cover the cost of the operation of the program required by this Article.

(1973, c. 438, s. 1; 1975, c. 716, s. 5; 1979, c. 469, c. 667, s. 30; 1981, c. 673, ss. 1, 2; c. 690, s. 12; 1981 (Reg. Sess., 1982), c. 1257, s. 3; 1983, c. 443, s. 2; 1983 (Reg. Sess., 1984), c. 1062, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "11 years" for "16 years" in subsection (a), added the language "and shall be accompanied by a birth certificate and other proof of identification which shall be returned when the special identification card is issued" at the end of subsection (b), and in subsection (d) deleted "automatically" preceding "expire" and substituted "fourth year of issuance" for "fourth year following the year of issuance" in the first sentence, inserted "which shall be placed in the Highway Fund" following "($5.00)" near the beginning of the second sentence, and added the proviso at the end of the second sentence, relating to a reserve fund.

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-49. Police authority of Division.

CASE NOTES

Inspection of a car's identification number differs from a search of a vehicle and seizure of its contents in one important aspect. The occupants of the car cannot harbor an expectation of privacy concerning the identification of the vehicle. State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

A police officer should be freer to inspect the identification number without a warrant than he is to search a car for purely private property. State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

The state requires manufacturers to identify vehicles by affixing identification numbers which are also recorded in registries where the police and any interested person may inspect them. Since identification numbers are, at the least, quasi-public information, a search of that part of the car displaying the number is but a minimal invasion of a person's privacy. State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-52. Application for registration and certificate of title.

CASE NOTES

Applied in State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

§ 20-63. Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

Editor's Note. — Session Laws 1983, c. 761, s. 140, provides that notwithstanding § 105-164.4(1), the Department of Transportation may deduct and retain from the sales tax on motor vehicles an amount equal to the cost to the Division of collecting this tax, not to exceed $475,000 per year, and that the cost of collecting this tax shall be determined by Secretary of Transportation subject to the approval of the State Budget Officer. As amended by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 202, the 1983 act further provides that notwithstanding § 20-63(h) the cost of collection shall include an increase in the commission paid to the branch agents of Division to 70¢ per transaction. Session Laws 1983, c. 923, s.

217, makes s. 140 of c. 761 effective Aug. 1, 1983. Session Laws 1983, c. 761, s. 259, is a severability clause. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes c. 1034 effective July 1, 1984. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

CASE NOTES

Legislative Intent. —

This statute shows a clear legislative intent to provide victims of highway collisions with the opportunity to recover from the owner as well as the driver of the vehicle involved in the accident. It enables the plaintiff relying on an agency theory to submit a prima facie case to the jury. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

North Carolina has an obligation to protect persons using North Carolina roads built and maintained to a large degree with North Carolina taxpayers' funds, whether they are citizens of this State or out-of-state citizens. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Section Applies Only Where, etc. —

Since the owner of a vehicle may be held liable for the negligence of an nonowner/operator under the doctrine of respondeat superior, proof of ownership is sufficient to take the case to the jury on the question of the legal responsibility of the defendant for the operation of the vehicle. DeArmon v. B. Mears Corp., — N.C. App. —, 314 S.E.2d 124 (1984).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.

CASE NOTES

Applied in Kraemer v. Moore, — N.C. App. —, 313 S.E.2d 610 (1984).

§ 20-80.1. Military Reserve license plates.

(a) The Commissioner shall cause to be made a sufficient number of distinctive motor vehicle license plates, in the form hereafter provided, for issuance to eligible members of the reserve components of the armed forces of the United States, upon proper application and under such regulations as he deems appropriate. Upon satisfactory proof of eligibilty, the commissioner shall collect fees in accordance with G.S. 20-81.3(b) and shall disburse fees in accordance with G.S. 20-81.3(c).

(b) Military license plates shall bear the words "Army Reserve", "Navy Reserve", "Air Force Reserve", "Marine Corps Reserve", or "Coast Guard Reserve" as appropriate. The center of the license plate shall bear the insignia of the officer corps of the appropriate service for reserve officers and shall bear the insignia of the appropriate service for reserve enlisted personnel. The license plates shall be numbered sequentially for each service with the numbers 1 through 5000 reserved for officers, to be issued based on the date of receipt of applications by the Commission without regard to rank.

(c) When the holder of a reserve license plate becomes ineligible for it due to change in status, he shall exchange the reserve plate for standard plate within 30 days. (1983 (Reg. Sess., 1984), c. 1062, s. 5.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1062, s. 8, makes this section effective July 1, 1984.

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106. Receiving or transferring stolen vehicles.

CASE NOTES

No Felonious Intent, etc. — Because the purpose of this section is to discourage the possession of stolen vehicles the State need only prove that the defendant knew or had reason to believe that the vehicle in his possession was stolen. No felonious intent is required. State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

§ 20-112. Making false affidavit perjury.

CASE NOTES

The crime of perjury requires, among other things, that a false statement under oath be knowingly made. State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-118. Weight of vehicles and load.

(i) The Department of Transportation is authorized to permit the operation on the highways of the State of certain vehicles pursuant to this subsection notwithstanding the provisions of G.S. 20-118(b). No vehicle or combination of vehicles in excess of the weight limitation provided by G.S. 20-118(b) shall operate on the Interstate highways, unless authorized by agreement with or approval of the United States Department of Transportation.

(1) The Department of Transportation is authorized to enter into an agreement with or obtain the approval of the United States Secretary of Transportation on behalf of the State of North Carolina concerning the control of vehicle weight as provided for in section 127 of Title 23 of the United States Code. The agreement or approval may provide as set out in G.S. 20-118(i)(2) for the continued operation of certain vehicles with axle and gross weights which could lawfully use the highways of this State on January 1, 1983, and which except for this subsection, would otherwise be illegal to operate on the highways of the State after October 1, 1983.

(2) The following vehicles will be permitted to operate pursuant to this subsection:

a. Four-axle vehicles with a tri-axle configuration,

b. Five-axle vehicles or combination of vehicles designed solely for the transportation of liquids, or tankers designed for bulk hauling,

c. Five-axle dump trucks with a tandem-axle configuration,

d. Three-axle vehicles with a "dump" body or ready-mixed concrete units equipped with tandem axles,

e. Three-axle and five-axle vehicles engaged in the transportation of construction materials,

f. Vehicles transporting raw and unprocessed agricultural or forest products, and

g. Three, four, or five-axle vehicles transporting garbage, refuse, and trash.

The authorization for vehicles to operate pursuant to G.S. 20-118(i)(2) on Interstate highways shall terminate October 1, 1988.

(3) The authorization, regulations, penalties and termination of authorization as provided for by the agreement with or approval from the United States Secretary of Transportation shall apply to Interstate highways of the State.

(4) Vehicles operating pursuant to G.S. 20-118(i)(2) shall be subject to the penalties for axle weight, tandem-axle weight and gross vehicle weight for exceeding weights permitted by this subsection at the same rate as is provided for by G.S. 20-118(e).

(5) The Department of Transportation is authorized to promulgate rules and regulations to carry out the provisions of G.S. 20-118(i) and to insure compliance with the agreement with or approval of the United States Secretary of Transportation. The Department of Transportation shall take such action in the name of the State of North Carolina as is necessary to comply with the terms of the agreement entered into with or approval of the United States Secretary of Transportation pursuant to this subsection.

(6) Vehicles described in G.S 20-118(i)(2) shall be permitted to operate on all streets and highways of North Carolina, except Interstate highways until October 1, 1993, subject to light-traffic road limitation, and subject to the penalties for axle weight, tandem-axle weight and gross vehicle weight for exceeding weights permitted by this subsection at the same rate as is provided for by G.S. 20-118(e).

(j) (1) Vehicles with tandem axles may continue to operate on the highways of the State with tandem-axle loads of 38,000 pounds in accordance with the provisions of G.S. 20-118(j).

(2) Vehicles operating pursuant to G.S. 20-118(j) are subject to the following limitations, conditions and penalties:

a. The single-axle weight shall not exceed 20,000 pounds; except on light-traffic roads, the single-axle weight shall not exceed the posted limits;

b. The axle group weight limitation shall be the same as is provided in G.S. 20-118(b)(3);

c. The penalties for exceeding the single-axle weight limitation and the axle group weight limitation shall be the same as is provided in G.S. 20-118(e);

d. The penalties for loads on tandem axles exceeding 38,000 pounds shall be at the same rate as is provided in G.S. 20-118(e) for tandem-axle loads, provided the owner or registrant shall be permitted to shift the load to avoid a penalty on the tandem axle if the gross weight of the vehicle is within the legal load limit provided in G.S. 20-118(i)(1) and the tandem-axle weight does not exceed 40,000 pounds.

(3) The exemption authorized by this subsection shall terminate October 1, 1993. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8; 1953, cc. 214, 1092; 1959, c. 872; c. 1264, s. 6; 1963, c. 159; c. 610, ss. 3-5; c. 702, s. 5; 1965, cc. 483, 1044; 1969, c. 537; 1973, c. 507, s. 5; c. 1449, ss. 1, 2; 1975, c. 325; c. 373, s. 2; c. 716, s. 5; c. 735; c. 736, ss. 1-3; 1977, c. 461; c. 464, s. 34; 1977, 2nd Sess., c. 1178; 1981, c. 690, ss. 27, 28; c. 726; c. 1127, s. 53.1; 1983, c. 407; c. 724, s. 1; 1983 (Reg. Sess., 1984), c. 1116, ss. 105-109.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "which were manufactured and licensed by the Division of Motor Vehicles prior to October 1, 1983" following "The following vehicles" at the beginning of subdivision (i)(2), deleted "and" at the end of paragraph (i)(2)e, inserted "and" at the end of paragraph (i)(2)f, added paragraph (i)(2)g, and deleted "which were manufactured and licensed by the Division of Motor Vehicles prior to October 1, 1983" following "Vehicle with tandem axles" at the beginning of subdivision (j)(1).

OPINIONS OF ATTORNEY GENERAL

A truck equipped with a total of four axles operating with one of the axles (air bag) in a raised position and not carrying any load is subject to the penalties prescribed by law if the weight of the truck exceeds the permissible limit for three axles. See opinion of Attorney General to Mr. J.G. Wilson, Director, License, Theft & Weight Enforcement, Division of Motor Vehicles, 52 N.C.A.G. 126 (1983).

§ 20-129. Required lighting equipment of vehicles.

CASE NOTES

The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional. But where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. State v. Gooden, 65 N.C. App. 75, 309 S.E.2d 707 (1983).

§ 20-134. Lights on parked vehicles.

CASE NOTES

Applied in King v. Allred, 309 N.C. 113, 305 S.E.2d 554 (1983); State v. Gooden, 65 N.C. App. 669, 309 S.E.2d 707 (1983).

§ 20-137.1. Child restraint systems required.

CASE NOTES

Regulations promulgated by the State Division of Motor Vehicles designed to insure that manufacturers comply with applicable standards for child passenger restraint systems by requiring verification of any equipment regulated by this section are preempted by the National Motor Vehicle Safety Act of 1966, 15 U.S.C.A. § 1381 et seq., as amended. Juvenile Prods. Mfrs. Ass'n v. Edmisten, 568 F. Supp. 714 (E.D.N.C. 1983).

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138.1. Impaired driving.

II. DRIVING UNDER THE INFLUENCE.

Use of Blood Alcohol Level as Proof. — See State v. Lockamy, 65 N.C. App. 75, 308 S.E.2d 750 (1983), decided under former § 20-138.

§ 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

(b4) Introducing Routine Records Kept as Part of Breath-Testing Program. — In civil and criminal proceedings, any party may introduce, without further authentication, simulator logs and logs for other devices used to verify a breath-testing instrument, certificates and other records concerning the check of ampoules and of simulator stock solution and the stock solution used in any other equilibration device, preventive maintenance records, and other records that are routinely kept concerning the maintenance and operation of breath-testing instruments. In a criminal case, however, this subsection does not authorize the State to introduce records to prove the results of a chemical analysis of the defendant or of any validation test of the instrument that is conducted during that chemical analysis. (1963, c. 966, s. 2; 1967, c. 123; 1969, c. 1074, s. 2; 1971, c. 619, ss. 12, 13; 1973, c. 476, s. 128; c. 1081, s. 2; c. 1331, s. 3; 1975, c. 405; 1979, 2nd Sess., c. 1089; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 435, s. 26; 1983 (Reg. Sess., 1984), c. 1101, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (b4).

CASE NOTES

I. IN GENERAL.

Constitutionality. See State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221, cert. denied and appeal dismissed, 309 N.C. 323, 307 S.E.2d 171 (1983).

Quoted in State v. Lockamy, 65 N.C. App. 75, 308 S.E.2d 750 (1983).

§ 20-140. Reckless driving.

CASE NOTES

I. IN GENERAL.

Stated in State v. Hefler, 310 N.C. 135, 310 S.E.2d 310 (1984).

§ 20-141. Speed restrictions.

CASE NOTES

I. IN GENERAL.

Applied in Murdock v. Ratliff, — N.C. —, 314 S.E.2d 518 (1984).

Stated in State v. Hefler, 310 N.C. 135, 310 S.E.2d 310 (1984).

Cited in State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983).

II. STANDARD OF CARE AND NEGLIGENCE.

And a motorist may not lawfully, etc. — Violation of the standard of care required by subsection (h) of this section is negligence per se. Murdock v. Ratliff, 63 N.C. App. 306, 305 S.E.2d 48 (1983).

§ 20-141.3. Unlawful racing on streets and highways.

CASE NOTES

The trial court did not err in failing to charge the jury on the issue of whether or not the defendant engaged in a willful speed competition, where there was no evidence that the defendant purposely and deliberately engaged in a race. Hord v. Atkinson, — N.C. App. —, 315 S.E.2d 339 (1984).

§ 20-141.4. Felony and misdemeanor death by vehicle.

CASE NOTES

Defendant May Assert Intervening Negligence of Another. — A defendant charged with death by vehicle under this section may assert the intervening negligence of another as a defense. State v. Tioran, 65 N.C. App. 122, 308 S.E.2d 659 (1983).

§ 20-145. When speed limit not applicable.

CASE NOTES

Standard of Care, etc. — For discussion of the action a reasonable man, who is serving as a member of the North Carolina state highway patrol should take when he tries to stop a motor vehicle for following too closely and the driver of the vehicle does not stop. McMillan v. Newton, 63 N.C. App. 751, 306 S.E.2d 470, cert. denied, 309 N.C. 821, 310 S.E.2d 350 (1983).

§ 20-146. Drive on right side of highway; exceptions.

CASE NOTES

Applied in Belk v. Peters, 63 N.C. App. 196, 303 S.E.2d 641 (1983).

§ 20-150. Limitations on privilege of overtaking and passing.

CASE NOTES

I. IN GENERAL.

Applied in Belk v. Peters, 63 N.C. App. 196, 303 S.E.2d 641 (1983).

§ 20-151. Driver to give way to overtaking vehicle.

CASE NOTES

The trial judge did not err in failing to charge the jury on the defendant's failure to yield to an overtaking vehicle, where there was no evidence presented that indicated that the other driver ever attempted to pass or to overtake the defendant once car chase had begun. Hord v. Atkinson, — N.C. App. —, 315 S.E.2d 339 (1984).

§ 20-157. Approach of police, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near police, fire department, or rescue squad vehicle or ambulance.

CASE NOTES

Quoted in State v. Davis, — N.C. App. —, 314 S.E.2d 828 (1984).

§ 20-158. Vehicle control signs and signals.

CASE NOTES

I. IN GENERAL.

Cited in State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983).

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

CASE NOTES

I. IN GENERAL.

To "park" means something more, etc. — In accord with 1st paragraph in original. See Adams v. Mills, — N.C. App. —, 314 S.E.2d 589 (1984).

Negligence Instruction. — Where defendant offered no evidence that plaintiff's actions constituted negligence in violation of subsection (a) of this section or with regard to any other standard of care, the trial judge was not obligated to charge the jury on contributory negligence or to submit it as an issue to them. Adams v. Mills, — N.C. App. —, 314 S.E.2d 589 (1984).

Applied in King v. Allred, 309 N.C. 113, 305 S.E.2d 554 (1983); State v. Gooden, 65 N.C. App. 669, 309 S.E.2d 707 (1983).

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Violation of this section, etc. — In accord with 1st paragraph in original. See Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

Proximate Cause, etc. — In accord with 1st paragraph in original. See Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

§ 20-161.1. Regulation of night parking on highways.

CASE NOTES

Applicability of section. — Section 20-168(b) makes this section, which prohibits bright lights on standing vehicles at night, inapplicable to street maintenance workers actually performing their duties. Pinkston v. Connor, 63 N.C. App. 628, 306 S.E.2d 132 (1983), aff'd, 310 N.C. 148, 310 S.E.2d 347 (1984).

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

CASE NOTES

I. IN GENERAL.

Applied in State v. Cobbins, — N.C. App. —, 311 S.E.2d 653 (1984).

§ 20-168. Drivers of State, county, and city vehicles subject to the provisions of this Article.

CASE NOTES

Applied in Pinkston v. Connor, 63 N.C. App. 628, 306 S.E.2d 132 (1983).

Part 11. Pedestrians' Rights and Duties.

§ 20-174. Crossing at other than crosswalks; walking along highway.

CASE NOTES

III. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

And violations of this section, etc. — Evidence of a violation of this section does not constitute negligence or contributory negligence per se, but rather is some proof of negligence, to be considered with the rest of the evidence in the case. Troy v. Todd, — N.C. App. —, 313 S.E.2d 896 (1984).

§ 20-175. Pedestrians soliciting rides, employment, business or funds upon highways or streets.

CASE NOTES

Applied in Pinkston v. Connor, 63 N.C. App. 628, 306 S.E.2d 132 (1983).

Part 12. Sentencing; Penalties.

§ 20-176. Penalty for misdemeanor.

CASE NOTES

Applied in Kraemer v. Moore, — N.C. App. —, 313 S.E.2d 610 (1984).

§ 20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

(c) Determining Existence of Grossly Aggravating Factors. — At the sentencing hearing, based upon the evidence presented at trial and in the hearing, the judge must first determine whether there are any grossly aggravating factors in the case. If the defendant has been convicted of two or more prior offenses involving impaired driving, if the convictions occurred within seven years before the date of the offense for which he is being sentenced, the judge must impose the Level One punishment under subsection (g).

The judge must also impose the Level One punishment if he determines that two or more of the following grossly aggravating factors apply:

(1) A single conviction for an offense involving impaired driving, if the conviction occurred within seven years before the date of the offense for which the defendant is being sentenced.

(2) Driving by the defendant at the time of the offense while his driver's license was revoked under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a).

(3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.

If the judge determines that only one of the above grossly aggravating factors applies, he must impose the Level Two punishment under subsection (h). In imposing a Level One or Two punishment, the judge may consider the aggravating and mitigating factors in subsections (d) and (e) in determining the appropriate sentence. If there are no grossly aggravating factors in the case, the judge must weigh all aggravating and mitigating factors and impose punishment as required by subsection (f).

(d) Aggravating Factors to Be Weighed. — The judge must determine before sentencing under subsection (f) whether any of the aggravating factors listed below apply to the defendant. The judge must weigh the seriousness of each aggravating factor in the light of the particular circumstances of the case. The factors are:

(1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.20 or more within a relevant time after the driving.

(2) Especially reckless or dangerous driving.

(3) Negligent driving that led to an accident causing property damage in excess of five hundred dollars ($500.00) or personal injury.

(4) Driving by the defendant while his driver's license was revoked.

(5) Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, if the convictions occurred within five years of the date of the offense for which the defendant is being sentenced, or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of the offense for which the defendant is being sentenced.

(6) Conviction under G.S. 20-141(j) of speeding by the defendant while fleeing or attempting to elude apprehension.

(7) Conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal limit.

(8) Passing a stopped school bus in violation of G.S. 20-217.

(9) Any other factor that aggravates the seriousness of the offense.

Except for the factor in subdivision (5) the conduct constituting the aggravating factor must occur during the same transaction or occurrence as the impaired driving offense.

(e) Mitigating Factors to Be Weighed. — The judge must also determine before sentencing under subsection (f) whether any of the mitigating factors listed below apply to the defendant. The judge must weigh the degree of mitigation of each factor in light of the particular circumstances of the case. The factors are:

(1) Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.11 at any relevant time after the driving.

(2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.

(3) Driving at the time of the offense that was safe and lawful except for the impairment of the defendant's faculties.

(4) A safe driving record, with the defendant's having no conviction for any motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the person's license is subject to revocation within five years of the date of the offense for which the defendant is being sentenced.

(5) Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage.

(6) The defendant's voluntary submission to a mental health facility for assessment after he was charged with the impaired driving offense for which he is being sentenced, and, if recommended by the facility, his voluntary participation in the recommended treatment.

(7) Any other factor that mitigates the seriousness of the offense.

Except for the factors in subdivisions (4), (6) and (7), the conduct constituting the mitigating factor must occur during the same transaction or occurrence as the impaired driving offense.

(f1) Aider and Abettor Punishment. — Nothwithstanding any other provisions of this section, a person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level Five punishment. The judge need not make any findings of grossly aggravating, aggravating, or mitigating factors in such cases.

(f2) Limit on Consolidation of Judgments. — Except as provided in subsection (f1), in each charge of impaired driving for which there is a conviction the judge must determine if the sentencing factors described in subsections (c), (d) and (e) are applicable unless the impaired driving charge is consolidated with a charge carrying a greater punishment. Two or more impaired driving charges may not be consolidated for judgment.

(g) Level One Punishment. — A defendant subject to Level One punishment may be fined up to two thousand dollars ($2,000) and must be sentenced to a term of imprisonment that includes a minimum term of not less than 14 days and a maximum term of not more than 24 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 14 days. If the defendant is placed on probation, the judge must, if required by subsections (*l*) or (m), impose the conditions relating to treatment and education described in those subsections. The judge may impose any other lawful condition of probation. If the judge does not place on probation a defendant who is otherwise subject to the mandatory assessment and treatment provisions of subsection (m), he must include in the record of the case his reasons for not doing so.

(h) Level Two Punishment. — A defendant subject to Level Two punishment may be fined up to one thousand dollars ($1,000) and must be sentenced to a term of imprisonment that includes a minimum term of not less than seven days and a maximum term of not more than 12 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least seven days. If the defendant is placed on probation, the judge must, if required by subsections (*l*) or (m), impose the conditions relating to treatment and education described in those subsections. The judge may impose any other lawful condition of probation. If the judge does not place on probation a defendant who is otherwise subject to the mandatory assessment and treatment provisions of subsection (m), he must include in the record of the case his reasons for not doing so.

(i) Level Three Punishment. — A defendant subject to Level Three punishment may be fined up to five hundred dollars ($500.00) and must be sen-

tenced to a term of imprisonment that includes a minimum term of not less than 72 hours and a maximum term of not more than six months. The term of imprisonment must be suspended, on the condition that the defendant:

(1) Be imprisoned for a term of at least 72 hours as a condition of special probation; or

(2) Perform community service for a term of at least 72 hours; or

(3) Not operate a motor vehicle for a term of at least 90 days; or

(4) Any combination of these conditions.

The judge in his discretion may impose any other lawful condition of probation and, if required by subsections (*l*) or (m), must impose the conditions relating to treatment and education described in those subsections. This subsection does not affect the right of a defendant to elect to serve the suspended sentence of imprisonment as provided in G.S. 15A-1341(c).

(j) Level Four Punishment. — A defendant subject to Level Four punishment may be fined up to two hundred fifty dollars ($250.00) and must be sentenced to a term of imprisonment that includes a minimum term of not less than 48 hours and a maximum term of not more than 120 days. The term of imprisonment must be suspended, on the condition that the defendant:

(1) Be imprisoned for a term of 48 hours as a condition of special probation; or

(2) Perform community service for a term of 48 hours; or

(3) Not operate a motor vehicle for a term of 60 days; or

(4) Any combination of these conditions.

The judge in his discretion may impose any other lawful condition of probation and, if required by subsections (*l*) or (m), must impose the conditions relating to treatment and education described in those subsections. This subsection does not affect the right of a defendant to elect to serve the suspended sentence of imprisonment as provided in G.S. 15A-1341(c).

(k) Level Five Punishment. — A defendant subject to Level Five punishment may be fined up to one hundred dollars ($100.00) and must be sentenced to a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment must be suspended, on the condition that the defendant:

(1) Be imprisoned for a term of 24 hours as a condition of special probation; or

(2) Perform community service for a term of 24 hours; or

(3) Not operate a motor vehicle for a term of 30 days; or

(4) Any combination of these conditions.

The judge may in his discretion impose any other lawful condition of probation and, if required by subsections (*l*) or (m), must impose the conditions relating to treatment and education described in those subsections. This subsection does not affect the right of a defendant to elect to serve the suspended sentence of imprisonment as provided in G.S. 15A-1341(c).

(*l*) Education Required in Certain Cases. — If a defendant being sentenced under this section is placed on probation, he must be required as a condition of that probation to complete the course of instruction successfully at an alcohol and drug education traffic school established pursuant to G.S. 20-179.2 within 90 days of the date of conviction unless:

(1) He has previously been assigned to an alcohol and drug education traffic school and has successfully completed the course of instruction; or

(2) The judge finds that the defendant will not benefit from the course of instruction because of specific, extenuating circumstances; or

(3) There is no alcohol and drug education traffic school within a reasonable distance of the defendant's residence.

(n) Time Limits for Performance of Community Service. — If the judgment requires the defendant to perform a specified number of hours of community service as provided in subsections (i), (j), or (k), the community service must be completed:

(1) Within 90 days, if the amount of community service required is 72 hours or more; or

(2) Within 60 days, if the amount of community service required is 48 hours; or

(3) Within 30 days, if the amount of community service required is 24 hours.

The court may extend these time limits upon motion of the defendant if it finds that the defendant has made a good faith effort to comply with the time limits specified in this subsection.

(o) Evidentiary Standards; Proof of Prior Convictions. — In the sentencing hearing, the State must prove any grossly aggravating or aggravating factor by the greater weight of the evidence, and the defendant must prove any mitigating factor by the greater weight of the evidence. Evidence adduced by either party at trial may be utilized in the sentencing hearing. Except as modified by this section, the procedure in G.S. 15A-1334(b) governs. The judge may accept any evidence as to the presence or absence of previous convictions that he finds reliable but he must give prima facie effect to convictions recorded by the Division or any other agency of the State of North Carolina. A copy of such conviction records transmitted by the police information network in general accordance with the procedure authorized by G.S. 20-26(b) is admissible in evidence without further authentication. If the judge decides to impose an active sentence of imprisonment that would not have been imposed but for a prior conviction of an offense, the judge must afford the defendant an opportunity to introduce evidence that the prior conviction had been obtained in a case in which he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves by the preponderance of the evidence all three above facts concerning the prior case, the conviction may not be used as a grossly aggravating or aggravating factor.

(p) Limit on Amelioration of Punishment. — For active terms of imprisonment imposed under this section:

(1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

(2) The defendant must serve the mandatory minimum period of imprisonment and good or gain time credit may not be used to reduce that mandatory minimum period.

(3) The defendant may not be released on parole unless he is otherwise eligible and has served the mandatory minimum period of imprisonment.

With respect to the minimum or specific term of imprisonment imposed as a condition of special probation under this section, the judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

(1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125; 1977, 2nd Sess., c. 1222, s. 1; 1979, c. 453, ss. 1, 2; c. 903, ss. 1, 2; 1981, c. 466, ss. 4-6; 1983, c. 435, s. 29; 1983 (Reg. Sess., 1984), c. 1101, ss. 21-29, 36.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1101, s. 38, makes ss. 3, 8, 13, 16, 22, 23, 34, 35 and 36 of the act effective October 1, 1984, and the remaining sections, except as provided in s. 37, effective upon ratification. Section 37 sets out special provisions with regard to s. 32, which amends § 20-179.3. The act was ratified July 6, 1984.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1101, ss. 21 and 24 to 29, effective July 6, 1984, substituted "before the date of the offense" for "of the date of the offense" in the second sentence of the introductory paragraph of subsection (c) and in subdivision (c)(1), inserted "at the time of the offense" in subdivision (c)(2), inserted "at the time of the offense" at the end of subdivision (c)(3), inserted subsections (f1) and (f2), inserted "that includes a minimum term" and "a maximum term of" in subsections (g), (h), (i), (j), (k), substituted "if required by" for "if required" in the third sentence of subsection (k), inserted "or" at the end of subdivision (*l*)(2), added subdivision (*l*)(3), substituted "the conviction may not be used as a grossly aggravating or aggravating factor" for "that conviction may not be used as a basis for imposing an active sentence of imprisonment" at the end of subsection (o), and rewrote subsection (p).

The 1983 (Reg. Sess., 1984) amendment by c. 1101, ss. 22, 23 and 36, effective October 1, 1984, deleted "if the offense occurred during the same act or transaction as the impaired driving offense" at the end of subdivisions (d)(6) and (d)(7), added the last sentence of subsection (d), substituted "motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the person's license is subject to revocation" for "serious traffic violation" in subdivision (e)(4), substituted "the impaired driving offense for which he is being sentenced" for "impaired driving" in subdivision (e)(6), added the last sentence of subsection (e), and deleted the last sentence of subsection (n), which read "Failure to complete the community service requirements within the applicable time limits is a violation of the defendant's probation and, in addition, is a ground for revocation of any limited driving privilege held by the defendant for the impaired driving offense."

CASE NOTES

Cited in State v. Gooden, 65 N.C. App. 669, 309 S.E.2d 707 (1983).

§ 20-179.3. Limited driving privilege.

(b) Eligibility. — A person convicted of the offense of impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if:

(1) At the time of the offense he held either a valid driver's license or a license that had been expired for less than one year;

(2) At the time of the offense he had not within the preceding seven years been convicted of an offense involving impaired driving;

(3) Punishment Level Three, Four, or Five was imposed for the offense of impaired driving; and

(4) Subsequent to the offense he has not been convicted of, or had an unresolved charge lodged against him for, an offense involving impaired driving.

A person whose North Carolina driver's license is revoked because of a conviction in another jurisdiction substantially equivalent to impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if he would be eligible for it had the conviction occurred in North Carolina. Eligibility for a limited driving privilege following a revocation under G.S. 20-16.2(d) is governed by G.S. 20-16.2(e1).

(d) Application for and Scheduling of Subsequent Hearing. — The application for a limited driving privilege made at any time after the day of sentencing must be filed with the clerk in duplicate, and no hearing scheduled may be held until a reasonable time after the clerk files a copy of the application with the district attorney's office. The hearing must be scheduled before:

(1) The presiding judge at the applicant's trial if that judge is assigned to a court in the judicial district in which the conviction for impaired driving was imposed.

(2) The senior regular resident superior court judge of the district in which the conviction for impaired driving was imposed, if the presiding judge

is not available within the district and the conviction was imposed in superior court.

(3) The chief district court judge of the district in which the conviction for impaired driving was imposed, if the presiding judge is not available within the district and the conviction was imposed in district court.

If the applicant was convicted of an offense in another jurisdiction, the hearing must be scheduled before the chief district court judge of the district in which he resides. G.S. 20-16.2(e1) governs the judge before whom a hearing is scheduled if the revocation was under G.S. 20-16.2(d). The hearing may be scheduled in any county within the judicial district.

(f) Overall Provisions on Use of Privilege. — Every limited driving privilege must restrict the applicant to essential driving related to the purposes listed in subsection (a), and any driving that is not related to those purposes is unlawful even though done at times and upon routes that may be authorized by the privilege. If the privilege is granted, driving related to emergency medical care is authorized at any time and without restriction as to routes, but all other driving must be for a purpose and done within the restrictions specified in the privilege.

(f1) Definition of "Standard Working Hours". — Under this section, "standard working hours" are 6:00 A.M. to 8:00 P.M. on Monday through Friday.

(g) Driving for Work-Related Purposes in Standard Working Hours. — In a limited driving privilege, the court may authorize driving for work-related purposes during standard working hours without specifying the times and routes in which the driving must occur. If the applicant is not required to drive for essential work-related purposes except during standard working hours, the limited driving privilege must prohibit driving during nonstandard working hours unless the driving is for emergency medical care or is authorized by subsection (g2). The limited driving privilege must state the name and address of the applicant's place of work or employer, and may include other information and restrictions applicable to work-related driving in the discretion of the court.

(g1) Driving for Work-Related Purposes in Nonstandard Hours. — If the applicant is required to drive during nonstandard working hours for an essential work-related purpose, he must present documentation of that fact before the judge may authorize him to drive for this purpose during those hours. If the applicant is self-employed, the documentation must be attached to or made a part of the limited driving privilege. If the judge determines that it is necessary for the applicant to drive during nonstandard hours for a work-related purpose, he may authorize the applicant to drive subject to these limitations:

(1) If the applicant is required to drive to and from a specific place of work at regular times, the limited driving privilege must specify the general times and routes in which the applicant will be driving to and from work, and restrict driving to those times and routes.

(2) If the applicant is required to drive to and from work at a specific place, but is unable to specify the times at which that driving will occur, the limited driving privilege must specify the general routes in which the applicant will be driving to and from work, and restrict the driving to those general routes.

(3) If the applicant is required to drive to and from work at regular times but is unable to specify the places at which work is to be performed, the limited driving privilege must specify the general times and geographic boundaries in which the applicant will be driving, and restrict driving to those times and within those boundaries.

(4) If the applicant can specify neither the times nor places in which he will be driving to and from work, or if he is required to drive during these nonstandard working hours as a condition of employment, the

limited driving privilege must specify the geographic boundaries in which he will drive and restrict driving to that within those boundaries.

The limited driving privilege must state the name and address of the applicant's place of work or employer, and may include other information and restrictions applicable to work-related driving, in the discretion of the court.

(g2) Driving for Other than Work-Related Purposes. — A limited driving privilege may not allow driving for maintenance of the household except during standard working hours, and the limited driving privilege may contain any additional restrictions on that driving, in the discretion of the court. The limited driving privilege must authorize driving essential to the completion of any community work assignments, course of instruction at an Alcohol and Drug Education Traffic School, or substance abuse assessment or treatment, to which the applicant is ordered by the court as a condition of probation for the impaired driving conviction. If this driving will occur during nonstandard working hours, the limited driving privilege must specify the same limitations required by subsection (g1) for work-related driving during those hours, and it must include or have attached to it the name and address of the Alcohol and Drug Education Traffic School, the community service coordinator, or mental health treatment facility to which the applicant is assigned. Driving for educational purposes other than the course of instruction at an Alcohol and Drug Education Traffic School is subject to the same limitations applicable to work related driving under subsections (g) and (g1).

(j) Effect of Violation of Restriction. — A holder of a limited driving privilege who violates any of its restrictions commits the offense of driving while his license is revoked under G.S. 20-28(a) and is subject to punishment and license revocation as provided in that section. If a law-enforcement officer has reasonable grounds to believe that the holder of a limited driving privilege has consumed alcohol while driving or has driven while he has remaining in his body any alcohol previously consumed, the suspected offense of driving while license is revoked is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2. If a holder of a limited driving privilege is charged with driving while license revoked by violating a restriction contained in his limited driving privilege, and a judicial official determines that there is probable cause for the charge, the limited driving privilege is suspended pending the resolution of the case, and the judicial official must require the holder to surrender the limited driving privilege. The judicial official must also notify the holder that he is not entitled to drive until his case is resolved.

(1983, c. 435, s. 31; 1983 (Reg. Sess., 1984), c. 1101, ss. 30-33.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984) c. 1101, s. 37, provides: "Section 32 of this Act is effective upon ratification: Provided that a judge authorized to issue a limited driving privilege under G.S. 20-179.3(d) is authorized, upon application of a holder of a limited driving privilege who has been convicted of the offense of impaired driving under G.S. 20-138.1, to modify that limited driving privilege in accordance with G.S. 20-179.3, as amended by Section 32 of this act."

Session Laws 1983 (Reg. Sess., 1984), c. 1101, s. 38, makes ss. 3, 8, 13, 16, 22, 23, 34, 35 and 36 of the act effective October 1, 1984, and the remaining sections, except as provided in s. 37, effective upon ratification. The act was ratified July 6, 1984.

Effect of Amendments. — The amendment by 1983 (Reg. Sess., 1984), c. 1101, ss. 30, 31 and 33, effective July 6, 1984, rewrote subdivision (b)(1), which read "At the time of the offense he held a valid driver's license," substituted "seven years" for "10 years" in subdivision (b)(2), substituted "at any time after the day of sentencing" for "subsequent to sentencing" in the first sentence of the introductory language of subsection (d), and inserted "driving while license revoked by" in the third sentence of subsection (j).

The amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1101, s. 32, rewrote subsection

(f), inserted subsection (f1), rewrote subsection (g), and inserted subsections (g1) and (g2). For effective date and additional provision applicable to this amendment, see the Editor's note, above.

§ 20-179.4. Community service alternative punishment; responsibilities of the Department of Crime Control and Public Safety; fee.

(c) A fee of one hundred dollars ($100.00) must be paid by all persons serving a community service sentence. That fee must be paid to the clerk of court in the county in which the person is convicted. The fee must be paid in full within two weeks unless the court, upon a showing of hardship by the person, allows him additional time to pay the fee. The person may not be required to pay the fee before he begins the community service unless the court specifically orders that he do so. If the person is also ordered to attend an Alcohol and Drug Education Traffic School established pursuant to G.S. 20-179.2, the fee for supervision of community service punishment is fifty dollars ($50.00).

(e) The coordinator must report to the court in which the community service was ordered a significant violation of the terms of the probation judgment related to community service. In such cases, the court must conduct a hearing to determine if there is a willful failure to comply. If the court determines there is a willful failure to pay the prescribed fee or to complete the work as ordered by the coordinator within the applicable time limits, the court must revoke any limited driving privilege issued in the impaired driving case, and in addition may take any further action authorized by Article 82 of General Statutes Chapter 15A for violation of a condition of probation. (1983, c. 761, s. 154; 1983 (Reg. Sess., 1984), c. 1101, ss. 34, 35.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — For provision relating to a deferred prosecution, community service restitution, and volunteer program for youthful and adult offenders, which provides that one or more coordinators may be assigned to each judicial district to assure and report to the Court the offender's compliance with the requirements of the program, and authorizes the designation of the same person to serve as a coordinator under this section and under that section, see § 143B-475.1.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, substituted the present second through fourth sentences of subsection (c) for the former second and third sentences thereof, relating to the payment of the fee, and rewrote subsection (e).

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

CASE NOTES

Applied in State v. Davis, — N.C. App. —, 311 S.E.2d 19 (1984).

ARTICLE 4.

State Highway Patrol.

§ 20-187.3. Quotas prohibited.

(a) The Secretary of Crime Control and Public Safety shall not make or permit to be made any order, rule, or regulation requiring the issuance of any minimum number of traffic citations, or ticket quotas, by any member or members of the State Highway Patrol. Pay and promotions of members of the Highway Patrol shall be based on their overall job performance and not on the basis of the volume of citations issued or arrests made. The provisions of G.S. 126-7 shall not apply to members of the State Highway Patrol. Members of the Highway Patrol shall, however, be subject to salary classes, ranges and longevity pay for service as are applicable to other State employees generally. Beginning July 1, 1985, and annually thereafter, each member of the Highway Patrol shall be granted a salary increase in an amount corresponding to the increments between steps within the salary range established for the class to which the member's position is assigned by the State Personnel Commission, not to exceed the maximum of each applicable salary range.

(b) The Secretary of Crime Control and Public Safety, subject to the availability of funds as authorized by the Director of the Budget, may place a member of the State Highway Patrol in any step in the salary range for the class to which the member is assigned based on the member's rank so that no member is in a step lower than others of the same rank who have held that rank for less time than that member. (1981, c. 429; 1983 (Reg. Sess., 1984), c. 1034, ss. 106, 107; c. 1116, s. 89.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1034, ss. 106 and 107, effective July 1, 1984, designated the first paragraph as subsection (a), added the third sentence of subsection (a), and added subsection (b).

The 1983 (Reg. Sess., 1984) amendment by c. 1116, s. 89, effective July 1, 1984, added the last two sentences of subsection (a).

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.21. "Motor vehicle liability policy" defined.

CASE NOTES

I. GENERAL CONSIDERATION.

The manifest purpose of this Article, etc. The primary purpose of the compulsory motor vehicle liability insurance required by North Carolina's Financial Responsibility Act is to compensate innocent victims who have been injured by financially irresponsible motorists. Furthermore, the act is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. South Carolina Ins. Co. v. Smith, — N.C. App. —, 313 S.E.2d 856 (1984).

Article 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-288. Application for license; information required and considered; expiration of license; supplemental license; bond.

CASE NOTES

Only purchasers of motor vehicles may recover under a motor vehicle surety bond.
Fink v. Stallings 601 Sales, Inc., 64 N.C. App. 604, 307 S.E.2d 829 (1983).

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

Legal Periodicals. —
For survey of 1982 law on commercial law, see 61 N.C.L. Rev. 1018 (1983).

Article 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-309. (Effective September 15, 1984) Financial responsibility prerequisite to registration; must be maintained throughout registration period.

(a) No self-propelled motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.

(b) Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in Article 9A, Chapter 20 of the General Statutes of North Carolina, as amended.

(c) When it is certified that financial responsibility is a liability insurance policy, the Commissioner of Motor Vehicles may require that the owner produce records to prove the fact of such insurance, and failure to produce such records shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned. It shall be the duty of insurance companies, upon request of the Division, to verify the accuracy of any owner's certification.

(d) When liability insurance with regard to any motor vehicle is terminated by cancellation or failure to renew, or the owner's financial responsibility for the operation of any motor vehicle is otherwise terminated, the owner shall forthwith surrender the registration certificate and plates of the vehicle to the Division of Motor Vehicles unless financial responsibility is maintained in some other manner in compliance with this Article.

(e) Upon termination by cancellation or otherwise of an insurance policy provided in subsection (b) of this section, the insurer shall notify the Division of such termination. The Division, upon receiving notice of cancellation or termination of an owner's financial responsibility as required by this Article, shall notify such owner of such cancellation or termination, and such owner shall within 15 days from date of the notice given by the Division, in order to retain the registration plate for the vehicle registered or required to be registered, certify to the Division that he has financial responsibility effective on or prior to the date of such termination.

Failure of the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and unless the owner's registration plate has on or prior to the date of termination of insurance been surrendered to the Division by surrender to an agent or representative of the Division designated by the Commissioner, or depositing the same in the United States mail, addressed to the Division of Motor Vehicles, Raleigh, North Carolina, the Division shall revoke the vehicle's registration for 30 days.

In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be reregistered in the name of the registered owner, spouse, or any child of the spouse, or any child of such owner within less than 30 days after the date of receipt of the registration plate by the Division of Motor Vehicles, except that a spouse living separate and apart from the registered owner may register such vehicle immediately in such spouse's name. Additionally, as a condition precedent to the reregistration of the vehicle by the registered owner, spouse, or any child of the spouse, or any child of such owner, except a spouse living separate and apart from the registered owner, the payment of a restoration fee of fifty dollars ($50.00) and the appropriate fee for a new registration plate is required. Any person, firm or corporation failing to give notice of termination shall be subject to a civil penalty of two hundred dollars ($200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Division.

(f) The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the Commissioner under the provisions of this Article. (1957, c. 1393, s. 1; 1959, c. 1277, s. 1; 1963, c. 964, s. 1; 1965, c. 272; c. 1136, ss. 1, 2; 1967, c. 822, ss. 1, 2; c. 857, ss. 1, 2; 1971, c. 477, ss. 1, 2; c. 924; 1975, c. 302; c. 348, ss. 1-3; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 1; 1981, c. 690, s. 25; 1983, c. 761, s. 146; 1983 (Reg. Sess., 1984), c. 1069, ss. 1, 2.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1069, s. 2, amends ss. 146 and 147 of Session Laws 1983, c. 761, which amended this section and § 20-311, by changing the effective date of c. 761 from August 1, 1984, to September 15, 1984.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 2, 1984, amended Session Laws 1983, c. 761, s. 146 by rewriting the third paragraph of subsection (e). For the effective date of Session Laws 1983, c. 761, see the Editor's note above.

§ 20-311. (Effective September 15, 1984) Revocation of registration when financial responsibility not in effect.

Upon receipt of evidence that financial responsibility for the operation of any motor vehicle registered or required to be registered in this State is not or was not in effect at the time of operation or certification that insurance was in effect, the Division shall revoke the owner's registration plate issued for the vehicle at the time of operation or certification that insurance was in effect or the current registration plate for the vehicle in the year registration has changed for 30 days.

The vehicle for which registration has been revoked pursuant to this section may be registered at the end of the 30-day revocation period upon certification of financial responsibility and payment by the vehicle owner of a fifty-dollar ($50.00) administrative fee in addition to appropriate license fees. In no event may such vehicle be registered prior to payment of the fifty dollar ($50.00) administrative fee. (1957, c. 1393, s. 3; 1959, c. 1277, s. 2; 1963, c. 964, s. 4; 1965, c. 205; c. 1136, s. 3; 1967, c. 822, s. 3; c. 857, s. 4; 1971, c. 477, s. 3; 1975, c. 348, s. 4; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 2; 1983, c. 761, s. 147; 1983 (Reg. Sess., 1984), c. 1069, s. 2.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1069, s. 2, amends ss. 146 and 147 of Session Laws 1983, c. 761, which amended § 20-309 and this section, by changing the effective date of c. 761 from August 1, 1984, to September 15, 1984.

ARTICLE 16.

Professional Housemoving.

§ 20-359.1. Insurance requirements.

OPINIONS OF ATTORNEY GENERAL

Liability for the movement of any building or structure by automobile or mobile equipment can not be excluded from the insurance coverage required to be furnished for licensure by a professional house mover pursuant to this section. See opinion of Attorney General to Mr. W.F. Rosser, P.E., Head of Maintenance, North Carolina Department of Transportation, 52 N.C.A.G. 105 (1983).

Chapter 22.

Contracts Requiring Writing.

§ 22-2. Contract for sale of land; leases.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

I. IN GENERAL.

Purpose of Section, etc. —
The statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made. House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

Quantum meruit claim, which is implied by law rather than agreed to by the parties, is not within the statute of frauds. Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

Applied in Bennett v. Fuller, — N.C. App. —, 313 S.E.2d 597 (1984).

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

An agreement to buy and sell, etc. —
The statute of frauds clearly does not apply to an oral contract to divide profits from the sale of land. Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983).

The statute of frauds has no application to those contracts whereby two persons agreed to purchase land, either generally or as a single venture, for the purpose of reselling the same at a profit and sharing the same between them. Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983).

License to use land is not an interest in land. Thus, the statute of frauds has no application. Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

What the Writing Must Contain. —
In accord with 4th paragraph in 1983 Cum. Supp. See House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

It is not necessary for all, etc. —
An enforceable lease or conveyance of land need not be set out in a single instrument, but may arise from a series of separate but related letters or other documents signed by the person to be charged or his authorized agent. Satterfield v. Pappas, — N.C. App. —, 312 S.E.2d 511 (1984).

Failure to Agree on Nonessential Terms. — If all essential elements of a contract to convey or lease land have been agreed upon by the parties and are contained in some writing or memoranda, signed by the party to be charged or his authorized agent, then there can still be a valid, binding contract to convey or lease land, even if there is no agreement on other nonessential terms. Satterfield v. Pappas, — N.C. App. —, 312 S.E.2d 511 (1984).

When Patent Ambiguity Exists. —
In accord with 2nd paragraph in 1983 Cum. Supp. See House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

When description in contract, etc. —
Patently ambiguous contract is void under the statute of frauds. House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

Patent Ambiguity a Question of Law. —
In accord with 2nd paragraph in 1983 Cum. Supp. See House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

Latent Ambiguity in Description. —
Where a contract incorporated by reference an external document by which identification of the land could be made certain, such internal reference rendered the contract latently, rather than patently ambiguous. House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

A description is latently ambiguous if it is insufficient, by itself, to identify the land, but refers to something external by which identification might be made. The reference must be to another document; that two documents refer to the same subject matter does not make them part of the same contract. The connection between documents must be clear and cannot be shown by extrinsic evidence. House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

V. PLEADING AND PRACTICE.

Use of Extrinsic Evidence to Show Connection Between Documents. — Although,

generally, extrinsic evidence is not allowed in this State to show the connection between two documents, once the connection is shown to exist, extrinsic evidence is admissible to explain or refute identification of the land therein described. House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

Where contract explicitly referred to land survey, reliance upon extrinsic evidence to show connection was unnecessary. House v. Stokes, — N.C. App. —, 311 S.E.2d 671 (1984).

Chapter 24.

Interest.

ARTICLE 1.

General Provisions.

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

CASE NOTES

Application of Section. — This section is obviously referring to claims which are defended by the liability insurer, because there is no logical reason to distinguish between claims against an uninsured defendant and an insured defendant defending a claim which falls short of the deductible amount of the insurance policy. R-Anell Homes, Inc. v. Alexander & Alexander, Inc., 62 N.C. App. 653, 303 S.E.2d 573 (1983).

No Interest on Awards Under State Tort Claims Act Absent Express Statutory Authority. — Because the State Tort Claims Act (§ 143-291 et seq.) is in derogation of sovereign immunity, and should, therefore, be strictly construed as written, there must be a specific statutory provision authorizing the accrual of interest on damage awards under the act. And although this section and § 24-7 refer to post-judgment interest, the General Assembly nevertheless recently enacted § 97-86.2 allowing interest on workers' compensation claims to be assessed on awards at the legal rate. Thus, the same type of statutory enactment would be necessary before any interest could accrue to a tort claims award. Myers v. Department of Crime Control & Pub. Safety, — N.C. App. —, 313 S.E.2d 276 (1984).

Applied in Inco, Inc. v. Planters Oil Mill, Inc., 63 N.C. App. 374, 304 S.E.2d 782 (1983).

§ 24-7. Interest from verdict to judgment added as costs.

CASE NOTES

No Interest on Awards Under State Tort Claims Act Absent Express Statutory Authority. — Because the State Tort Claims Act (§ 143-291 et seq.) is in derogation of sovereign immunity, and should, therefore, be strictly construed as written, there must be a specific statutory provision authorizing the accrual of interest on damage awards under the act. And although § 24-5 and this section refer to post-judgment interest, the General Assembly nevertheless recently enacted § 97-86.2 allowing interest on workers' compensation claims to be assessed on awards at the legal rate. Thus, the same type of statutory enactment would be necessary before any interest could accrue to a tort claims award. Myers v. Department of Crime Control & Pub. Safety, — N.C. App. —, 313 S.E.2d 276 (1984).

§ 24-11. Certain revolving credit charges.

CASE NOTES

Applied in Inco, Inc. v. Planters Oil Mill, Inc., 63 N.C. App. 374, 304 S.E.2d 782 (1983).

Chapter 25.

Uniform Commercial Code.

Article 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

Part 4. Filing.

Sec.

29-5-401. Place of filing; erroneous filing; removal of collateral.

Sec.

25-9-402. Formal requisites of financing statement; amendments; mortgage as financing statement.

Article 1.

General Provisions.

PART 1.

Short Title, Construction, Application and Subject Matter of the Act.

§ 25-1-103. Supplementary general principles of law applicable.

CASE NOTES

Cited in Martin-Kahill Ford Lincoln Mercury, Inc. v. Skidmore, 62 N.C. App. 736, 303 S.E.2d 392 (1983); Allen M. Campbell Co. v. Virginia Metal Indus., Inc., 708 F.2d 930 (4th Cir. 1983).

§ 25-1-106. Remedies to be liberally administered.

CASE NOTES

Cited in Quality Exch., Inc. v. Universal Air Freight, Inc., 574 F. Supp. 622 (W.D.N.C. 1983).

PART 2.

General Definitions and Principles of Interpretation.

§ 25-1-201. General definitions.

CASE NOTES

Applied in Connolly v. Potts, 63 N.C. App. 547, 306 S.E.2d 123 (1983); City Nat'l Bank v. Rojas, 64 N.C. App. 347, 307 S.E.2d 387 (1983); Abbott v. Blackwelder Furn. Co., 33 Bankr. 399 (Bankr. W.D.N.C. 1983).

ARTICLE 2.

Sales.

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-101. Short title.

Legal Periodicals. —
For survey of 1982 commercial law, see 61 N.C.L. Rev. 1018 (1983).

§ 25-2-106. Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation".

CASE NOTES

Applied in Abbott v. Blackwelder Furn. Co., 33 Bankr. 399 (Bankr. W.D.N.C. 1983).

Cited in Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

PART 2.

FORM, FORMATION AND READJUSTMENT OF CONTRACT.

§ 25-2-201. Formal requirements; statute of frauds.

CASE NOTES

Stated in Allen M. Campbell Co. v. Virginia Metal Indus., Inc., 708 F.2d 930 (4th Cir. 1983).

§ 25-2-210. Delegation of performance; assignment of rights.

CASE NOTES

Applied in Webber v. McCoy Lumber Co., 62 N.C. App. 740, 303 S.E.2d 408 (1983).

PART 3.

General Obligation and Construction of Contract.

§ 25-2-309. Absence of specific time provisions; notice of termination.

CASE NOTES

A contract which contains no definite term as to its duration is terminable at will by either party upon reasonable notice after a reasonable time. Citrini v. Goodwin, — N.C. App. —, 315 S.E.2d 354 (1984).

§ 25-2-313. Express warranties by affirmation, promise, description, sample.

CASE NOTES

Question of Fact. —
In accord with 1983 Cum. Supp. See Warren v. Joseph Harris Co., — N.C. App. —, 313 S.E.2d 901 (1984).

Applied in Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983).

Cited in McNair Constr. Co. v. Fogle Bros. Co., 64 N.C. App. 282, 307 S.E.2d 200 (1983).

§ 25-2-315. Implied warranty: Fitness for particular purpose.

CASE NOTES

Stated in Warren v. Joseph Harris Co., — N.C. App. —, 313 S.E.2d 901 (1984).

§ 25-2-316. Exclusion or modification of warranties.

Cited in Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984).

PART 4.

Title, Creditors and Good Faith Purchases.

§ 25-2-401. Passing of title; reservation for security; limited application of this section.

CASE NOTES

Applied in Abbott v. Blackwelder Furn. Co., 33 Bankr. 399 (Bankr. W.D.N.C. 1983).

PART 5.

PERFORMANCE.

§ 25-2-501. Insurable interest in goods; manner of identification of goods.

CASE NOTES

Applied in Abbott v. Blackwelder Furn. Co., 33 Bankr. 399 (Bankr. W.D.N.C. 1983).

§ 25-2-502. Buyer's right to goods on seller's insolvency.

CASE NOTES

Applied in Abbott v. Blackwelder Furn. Co., 33 Bankr. 399 (Bankr. W.D.N.C. 1983).

PART 7.

REMEDIES.

§ 25-2-716. Buyer's right to specific performance or replevin.

CASE NOTES

Applied in Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983); Abbott v. Blackwelder Furn. Co., 33 Bankr. 399 (Bankr. W.D.N.C. 1983).

§ 25-2-719. Contractual modification or limitation of remedy.

CASE NOTES

Unconscionability, etc. — It is rare that a limitation of remedy will be held unconscionable in a commercial setting since the relationship between business parties is usually not so one-sided as to force an unconscionable limitation on a party. Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983).

§ 25-2-725. Statute of limitations in contracts for sale.

CASE NOTES

Section Inapplicable Where Bodily Injury Is Part of Claim. — The North Carolina Supreme Court has declined to apply this section to claims for breach of warranties under the Uniform Commercial Code where bodily injury to the person is an essential element of the cause of action and has instead adopted as the appropriate statute of limitation the three-year period contained in § 1-52(1). Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

ARTICLE 3.

Commercial Paper.

PART 1.

SHORT TITLE, FORM AND INTERPRETATION.

§ 25-3-101. Short title.

Legal Periodicals. —
For survey of 1982 commercial law, see 61 N.C.L. Rev. 1018 (1983).

§ 25-3-104. Form of negotiable instruments; "draft"; "check"; "certificate of deposit"; "note."

CASE NOTES

Cited in North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

§ 25-3-115. Incomplete instruments.

CASE NOTES

Applied in First Nat'l Bank v. Burwell, 65 N.C. App. 590, 310 S.E.2d 47 (1983).

PART 3.

RIGHTS OF A HOLDER.

§ 25-3-302. Holder in due course.

CASE NOTES

Applied in City Nat'l Bank v. Rojas, 64 N.C. App. 347, 307 S.E.2d 387 (1983).
Cited in Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

§ 25-3-305. Rights of a holder in due course.

CASE NOTES

Applied in City Nat'l Bank v. Rojas, 64 N.C. App. 347, 307 S.E.2d 387 (1983).

Stated in Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

§ 25-3-307. Burden of establishing signatures, defenses and due course.

CASE NOTES

Stated in First Nat'l Bank v. Burwell, 65 N.C. App. 590, 310 S.E.2d 47 (1983).

PART 4.

Liability of Parties.

§ 25-3-401. Signature.

CASE NOTES

Applied in Cabarrus Bank & Trust Co. v. Chandler, 63 N.C. App. 724, 306 S.E.2d 184 (1983).

§ 25-3-416. Contract of guarantor.

CASE NOTES

Applied in Cabarrus Bank & Trust Co. v. Chandler, 63 N.C. App. 724, 306 S.E.2d 184 (1983).

Stated in First Nat'l Bank v. Burwell, 65 N.C. App. 590, 310 S.E.2d 47 (1983).

PART 6.

DISCHARGE.

§ 25-3-603. Payment or satisfaction.

CASE NOTES

The note of a third person given for a prior debt will be held a satisfaction, where it was agreed by the creditor to receive it absolutely as payment, and to run the risk of its being paid. The onus of establishing that it was so received is on the debtor. But there must be a clear and special agreement that the creditor shall take the paper absolutely as payment or it will be no payment if it afterwards turns out to be of no value. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

A receipt in full of an account does not establish an agreement on the part of the creditor to accept as absolute payment at his own risk the note of a third person for the debt. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

ARTICLE 4.

Bank Deposits and Collections.

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

§ 25-4-101. Short title.

Legal Periodicals. —
For survey of 1982 commercial law, see 61 N.C.L. Rev. 1018 (1983).

ARTICLE 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

PART 1.

SHORT TITLE, APPLICABILITY AND DEFINITIONS.

§ 25-9-101. Short title.

Legal Periodicals. —
For survey of 1982 commercial law, see 61 N.C.L. Rev. 1018 (1983).

§ 25-9-107. Definitions: "Purchase money security interest".

CASE NOTES

Cited in Russell v. HFC, 36 Bankr. 809 (Bankr. W.D.N.C. 1984).

§ 25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory".

CASE NOTES

Cited in Russell v. HFC, 36 Bankr. 809 (Bankr. W.D.N.C. 1984).

PART 2.

Validity of Security Agreement and Rights of Parties Thereto.

§ 25-9-201. General validity of security agreement.

CASE NOTES

Cited in Pierce v. Woodard, 29 Bankr. 612 (Bankr. E.D.N.C. 1983).

PART 3.

Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority.

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.

CASE NOTES

Cited in Pierce v. Woodard, 29 Bankr. 612 (Bankr. E.D.N.C. 1983); Russell v. HFC, 36 Bankr. 809 (Bankr. W.D.N.C. 1984).

§ 25-9-307. Protection of buyers of goods.

CASE NOTES

Extent to Which Consumer Takes Free of Interest in Inventory. — Consumer takes free of a secured creditor's interest in a debtor's inventory only to the extent that title to the

inventory has passed to the consumer. Abbott v. Blackwelder Furn. Co., 33 Bankr. 399 (Bankr. W.D.N.C. 1983).

PART 4.

FILING.

§ 25-9-401. Place of filing; erroneous filing; removal of collateral.

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, farm products, accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the register of deeds in the county of the debtor's residence if the debtor is a resident of this State, but in the office of the register of deeds in the county where the goods are kept if the debtor is not a resident of this State. When the collateral is farm products, an additional filing must be made in the office of the Secretary of State.

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, then in the office of the register of deeds in the county where the land is located;

(c) in all other cases, in the office of the Secretary of State and in addition, if the debtor has a place of business in only one county of this State, also in the office of the register of deeds of such county, or, if the debtor has no place of business in this State, but resides in the State, also in the office of the register of deeds of the county in which he resides.

(5) A filing which is made in the proper place in this State prior to January 1, 1985, continues to be effective even though under this section the place of filing has been changed. The effectiveness of any financing statement or continuation statement filed prior to January 1, 1985, may be continued by a continuation statement or amended as permitted by the Uniform Commercial Code, except that if this section requires a filing in an office where there was no previous financing statement, a new financing statement meeting the requirements of this section shall be filed in that office. Such new financing statement operating as a continuation statement may be filed within six months before the perfection of the security interest would otherwise lapse. Any such financing statement may be signed by either the debtor or the secured party. It shall identify the original financing statement and any amendment or continuation thereof, state the office where and the date when each filing was made, and state the filing number thereof.

(6) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, ss. 41, 42.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, rewrote subdivision (1)(a), added present subsection (5), and renumbered former subsection (5) as subsection (6).

§ 25-9-402. Formal requisites of financing statement; amendments; mortgage as financing statement.

(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must indicate that the collateral is or includes crops, must contain a description of the real estate concerned, and must contain the county of the debtor's residence, or where the debtor is not a resident of this State the county where the crops are growing or to be grown. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this State.

(1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; C. S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, rewrote the third sentence of subsection (1), which read "When the financing statement covers crops growing or to be grown, the statement must indicate that the collateral is or includes crops and must contain a description of the real estate concerned."

PART 5.

DEFAULT.

§ 25-9-503. Secured party's right to take possession after default.

CASE NOTES

Applied in In re Montgomery, 29 Bankr. 609 (Bankr. E.D.N.C. 1983).

§ 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.

CASE NOTES

Applied in In re Montgomery, 29 Bankr. 609 (Bankr. E.D.N.C. 1983).

§ 25-9-506. Debtor's right to redeem collateral.

CASE NOTES

Applied in In re Montgomery, 29 Bankr. 609 (Bankr. E.D.N.C. 1983).

Chapter 25A.

Retail Installment Sales Act.

§ 25A-2. "Consumer credit sale" defined.

Legal Periodicals. — For survey of 1982 commercial law, see 61 N.C.L. Rev. 1018 (1983).

CASE NOTES

Cited in Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984).

§ 25A-20. Disclaimer of warranty.

CASE NOTES

Cited in Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984).

§ 25A-44. Remedies and penalties.

CASE NOTES

Cited in Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984).

Chapter 28A.

Administration of Decedents' Estates.

Article 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-10. Liability of personal representative.

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

Article 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

CASE NOTES

Applied in Chamberlain v. Beam, 63 N.C. App. 377, 304 S.E.2d 770 (1983).

§ 28A-15-5. Order in which assets appropriated; abatement.

CASE NOTES

Applied in Chamberlain v. Beam, 63 N.C. App. 377, 304 S.E.2d 770 (1983).

Article 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

Applied in Elmore v. Elmore, — N.C. App. —, 313 S.E.2d 904 (1984).

Cited in Day v. Coffey, — N.C. App. —, 315 S.E.2d 96 (1984).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

Legal Periodicals. —
For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

I. IN GENERAL.

The right of action for wrongful death is limited, etc. —
In determining whether any wrongful death action is maintainable, the Supreme Court has consistently analyzed the question in terms of whether the deceased, had he lived, would have had a claim against defendant for the injuries inflicted. If so, then the estate of the deceased may maintain an action for wrongful death; if not, then the action for wrongful death will not lie. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Applied in Hairston v. Alexander Tank & Equip. Co., — N.C. —, 311 S.E.2d 559 (1984).

III. PARTIES TO THE ACTION.

Abrogation of Parental Immunity in Certain Cases. — It is not § 1-539.21 standing alone which abrogates parental immunity in wrongful death actions arising out of the operation of motor vehicles; it is § 1-539.21 and this section, read in pari materia, which bring about this result. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

When Administrator of Child May Bring Action Against Parents. —
As § 1-539.21 has abolished the doctrine of parental immunity in personal injury and property damage cases arising out of a parent's operation of a motor vehicle, the doctrine is no longer a bar to wrongful death actions by the deceased child's estate which likewise arise out of a parent's operation of a motor vehicle. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

When parental immunity would not have barred a personal injury action brought by the deceased child had he lived, it likewise does not bar a wrongful death action brought by his estate. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

A wrongful death action could be maintained on behalf of deceased child's estate against defendant mother, but only father would be entitled to share in any recovery. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Father was not barred from sharing in any recovery by his son's estate because of the negligence of his wife, the defendant. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Effect of Liability of Sole Beneficiary. — If recovery in a wrongful death action depends upon establishing the liability of a party who is the sole beneficiary of the decedent's estate, the action may not be maintained at all. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

IV. DISTRIBUTION OF RECOVERY.

Recovery Not Assets, etc. —
Proceeds recovered in a wrongful death action do not constitute part of the estate of the deceased generally except for certain limited purposes. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

V. DAMAGES RECOVERABLE.

The trier of fact must be apprised of those who are going to share in the recovery in ascertaining the amount of damages recoverable under subdivision (b)(4) of this section, for it is only the losses suffered by these persons as a result of decedent's death which may be taken into account in assessing these damages. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

In wrongful death actions where recovery depends on establishing the liability of a party who is also a beneficiary of the decedent's estate, any recovery obtained shall be reduced by that party-beneficiary's pro rata share, and that party-beneficiary is precluded from participating in the recovery; but the action may be maintained on behalf of the other beneficiaries, if any. Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Article 19.

Claims against the Estate.

§ 28A-19-3. Limitations on presentation of claims.

CASE NOTES

Applied in Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

Article 21.

Accounting.

§ 28A-21-2. Final accounts.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

Article 22.

Distribution.

§ 28A-22-3. Special proceeding against unknown heirs of decedent before distribution of estate.

CASE NOTES

Cited in Ladd v. Estate of Kellenberger, 64 N.C. App. 471, 307 S.E.2d 850 (1983).

Article 23.

Settlement.

§ 28A-23-4. Counsel fees allowable to attorneys serving as representatives.

Legal Periodicals. — For article on the continuing power of attorney, see 5 Camp. L. Rev. 305 (1983).

Chapter 29.

Intestate Succession.

Article 1.

General Provisions.

§ 29-2. Definitions.

CASE NOTES

Cited in Avery v. Haddock, — N.C. App. —, 315 S.E.2d 99 (1984).

Article 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

CASE NOTES

Cited in Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

§ 29-15. Shares of others than surviving spouse.

CASE NOTES

Quoted in Carver v. Carver, — N.C. —, 314 S.E.2d 739 (1984).

Article 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

Different Treatment of Mother and Father Not Unconstitutional. — While this section classifies the illegitimate's mother and her heirs and the putative father and his heirs differently by placing the additional requirement on the father to establish his paternity by one of the statutorily prescribed methods before he is permitted to inherit, this classification is substantially related to permissible State interests. This section does not violate the equal protection clause of U.S. Const., amend. 14 in this regard. Estate of Stern v. Stern, — N.C. App. —, 311 S.E.2d 909 (1984).

Interest of State in Inheritance by Father from Illegitimate Child. — The requirement imposed on the father of an illegitimate who would inherit from his illegitimate child is substantially related to the important State interests that this section is intended to promote. Estate of Stern v. Stern, — N.C. App. —, 311 S.E.2d 909 (1984).

Applicability of Subsection (d). — Subsection (d) of this section is clear in its meaning and applies only when the child is taking under a will from the putative father and not when the putative father or his heirs are attempting to inherit from the child under the intestacy statutes. Estate of Stern v. Stern, — N.C. App. —, 311 S.E.2d 909 (1984).

Cited in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

Chapter 31.

Wills.

Article 1.

Execution of Will.

§ 31-1. Who may make will.

CASE NOTES

Insane delusion must be distinguished from prejudice, hate, bad judgment, ill will, and any number of other conditions which might be associated with sanity. To be sufficient to invalidate the will, the delusion must have no foundation in fact and must be the product of the testator's diseased or deranged mind. However, to justify the setting aside of a will on the ground that the testatrix was possessed of an insane delusion, it must also be shown that the insane delusion was actually operative in the production of the will. In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

Partial Insanity and Insane Delusion Invalidate Will. — Generally, partial insanity will invalidate a will which is the direct offspring thereof, and a will which is the product of an insane delusion is also invalid for want of testamentary capacity. In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

Insane Delusion as to One of Essentials of Testamentary Capacity. — If a person has sufficient mental ability to make a will but is subject to an insane delusion, i.e., monomania, as to one of the essential requirements of testamentary capacity, the will would not be valid. For example, if the testator has an insane delusion as to the objects of his bounty, it would invalidate his will. In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

§ 31-3.3. Attested written will.

CASE NOTES

Conformance with Statutory Requirements Is Prima Facie Proof. — In a caveat proceeding, proof of the formal execution of an attested will in conformity with the statutory requirements establishes prima facie that the offered document is the will of the testator and is sufficient to allow the jury to find that the document is the will of the testator. In re Will of Cooley, — N.C. App. —, 311 S.E.2d 613 (1984).

Article 2.

Revocation of Will.

§ 31-5.1. Revocation of written will.

CASE NOTES

Cited in Craig v. Calloway, — N.C. App. —, 314 S.E.2d 823 (1984).

§ 31-5.6. No revocation by subsequent conveyance.

Legal Periodicals. — For article discussing the North Carolina Supreme Court's interpretation of this section, see 19 Wake Forest L. Rev. 151 (1983).

ARTICLE 7.

Construction of Will.

§ 31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.

CASE NOTES

The trial court correctly denied plaintiff's request for jury instructions to the effect that making a will passes no legal title where there was neither allegation nor evidence that any title to any property, real or personal, passed pursuant to any will. Craig v. Calloway, — N.C. App. —, 314 S.E.2d 823 (1984).

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

CASE NOTES

Construction. —

In accord with original. See Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), cert. granted, — N.C. —, 312 S.E.2d 651 (1984).

Chapter 31A.

Acts Barring Property Rights.

Article 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

CASE NOTES

History. — See Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), cert. granted, — N.C. —, 312 S.E.2d 651 (1984).

Legislative Intent. — See Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), cert. granted, — N.C. —, 312 S.E.2d 651 (1984).

Article 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

CASE NOTES

The public policy sought to be fostered by the enactment of this Article is predicated upon the theory that the murderer himself will not profit by his own wrongdoing, however, this principle does not extend to those related to the slayer. Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), cert. granted, — N.C. —, 312 S.E.2d 651 (1984).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

CASE NOTES

The slayer statute applies in conjunction with the anti-lapse statute (§ 31-42). Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), cert. granted, — N.C. —, 312 S.E.2d 651 (1984).

ARTICLE 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

CASE NOTES

Applied in Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983).

Chapter 32.

Fiduciaries.

Article 1.

Uniform Fiduciaries Act.

§ 32-1. Short title.

Legal Periodicals. — For article on the continuing power of attorney, see 5 Camp. L. Rev. 305 (1983).

Chapter 32A.

Powers of Attorney.

Article 1.

Statutory Short Form Power of Attorney.

§ 32A-1. Statutory Short Form of General Power of Attorney.

Legal Periodicals. — For article on the continuing power of attorney, see 5 Camp. L. Rev. 305 (1983).

OPINIONS OF ATTORNEY GENERAL

Codification of Chapter. — Session Laws 1983, c. 626, ratified on June 27, 1983, and effective October 1, 1983, as introduced and as enacted amended the General Statutes by adding a new Chapter 32B. However, at the time there was no Chapter 32A in the General Statutes, and therefore under the authority of G.S. 164-10, and in conformity with the usual rules of codification, the Division of Legislative Drafting and Codification of the Department of Justice authorized the codification of the new provisions as Chapter 32A. See opinion of Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, — N.C.A.G. —, February 28, 1984.

Reference to Chapter 32B. — A power of attorney that makes reference to Chapter 32B is legally effective as a durable power of attorney. See opinion of the Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, — N.C.A.G. —, February 28, 1984.

Reference to Chapter 32A. — A power of attorney that makes reference to Chapter 32A is legally effective as a durable power of attorney. See opinion of the Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, — N.C.A.G. —, February 28, 1984.

A reference to either Chapter 32A or 32B may be used; however it is suggested that a reference to Chapter 32A will be less confusing. See opinion of Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, — N.C.A.G. —, February 28, 1984.

Article 2.

Durable Power of Attorney.

§ 32A-8. Definition.

Legal Periodicals. — For article on the continuing power of attorney, see 5 Camp. L. Rev. 305 (1983).

Chapter 33.

Guardian and Ward.

Article 1.

Creation and Termination of Guardianship.

§ 33-9. Removal by clerk.

CASE NOTES

Applied in In re Thomas, 63 N.C. App. 495, 305 S.E.2d 566 (1983).

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 1A.

Guardianship of Incompetent Adults.

Part 2. Definitions.

§ 35-1.7. Definitions.

Legal Periodicals. — For article on the continuing power of attorney, see 5 Camp. L. Rev. 305 (1983).

Article 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Appointment of guardian.

CASE NOTES

Cited in In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

OPINIONS OF ATTORNEY GENERAL

Waiver of Jury Trial. — A respondent in an incompetency hearing pursuant to this section may waive the right to trial by jury. See opinion of the Attorney General to Mr. Frank S. Frederick, Clerk of Superior Court, Orange County, 52 N.C.A.G. 7 (1982).

Article 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

§ 35-39. Duty of petitioner.

CASE NOTES

The purpose of the standards governing mentally ill or retarded persons is to prevent unnecessary and unwarranted abridgment of the respondent's fundamental procreative rights while at the same time allowing the State to further its interests. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Findings of Fact Required. — In each case the trial court must carefully review the living conditions of the respondent to determine the substantial likelihood that he or she will voluntarily, or otherwise, engage in sexual

activity likely to cause impregnation. This will necessarily include an inquiry into the respondent's home environment, daily schedule, social activities, and the degree of supervision entailed in each aspect of this schedule. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

The statutory phrase "care for a child" is not defined, but the courts in construing the phrase must find whether the evidence establishes a minimum standard of care consistent with both State interest and fundamental parental rights. The petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Burden of Proof. — For purposes of instituting sterilization proceedings under this section, a determination that a proposed sterilization is in the respondent's best interests must include a determination that the respondent is sexually active and that no temporary measure for birth control or contraception will adequately meet the respondent's needs, in addition to the statutory grounds regarding defective offspring and parental unfitness. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

The petitioner must establish by clear, strong and convincing evidence that respondent is unable or unwilling to control procreation by alternative, less drastic contraceptive methods, including, but not limited to, supervision, education and training. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Before a sterilization can be ordered there must be a showing that the subject be shown to be likely to engage in sexual activity without utilizing contraceptive devices and is, therefore, likely to become impregnated. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

"Best Interest" Alone as Basis for Compulsory Sterilization. — Although subdivision (1) provides that social services shall petition for sterilization if it would be in the "best interests" of the mentally retarded individual, this language is not contained in § 35-43, the provision which specifically outlines the findings to be made by the trial judge. It is, therefore, doubtful whether compulsory sterilization can be ordered on the basis of undefined "best interests" alone in view of the fundamental interest at stake. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

§ 35-40. Contents of petition.

CASE NOTES

This Article does not define sterilization or indicate which medical procedure is to be used when a sterilization is ordered. This section suggests the existence of various alternative means of sterilization. The statutes are otherwise silent as to the procedures to be used. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

§ 35-43. Hearing before the judge of district court.

CASE NOTES

The purpose of the standards governing mentally ill or retarded persons is to prevent unnecessary and unwarranted abridgment of the respondent's fundamental procreative rights while at the same time allowing the State to further its interests. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Sterilization may not be ordered if there is a less drastic means available. In re Truesdell, — N.C. App. —, 304 S.E.2d 793 (1983).

It is only the rare and unusual, the particularly difficult case, where sterilization will be the only adequate method of contraception available. In re Truesdell, — N.C. App. —, 304 S.E.2d 793 (1983).

"Best Interest" Alone as Basis for Compulsory Sterilization. — Although § 35-39 states that social services shall petition for sterilization if it would be in the "best interests" of the mentally retarded individual, this language is not contained in this section. It is, therefore, doubtful whether compulsory sterilization can be ordered on the basis of undefined "best interests" alone in view of the fundamental interest at stake. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Findings of Fact Required. —

The trial court must carefully review the living conditions of the respondent to determine the substantial likelihood that he or she will voluntarily, or otherwise, engage in sexual activity likely to cause impregnation. This will necessarily include an inquiry into the respondent's home environment, daily schedule, social activities, and the degree of supervision entailed in each aspect of this schedule. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

The court must consider and make findings relative to the possibility that the respondent will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation. The latter consideration, of course, would also be applicable to a male candidate for sterilization. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

The statutory phrase, etc. —

In accord with 1983 Cum. Supp. See In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Burden of Proof. —

The petitioner must establish by clear, strong and convincing evidence that respondent is unable or unwilling to control procreation by alternative, less drastic contraceptive methods, including, but not limited to, supervision, education and training. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Before a sterilization can be ordered there must be a showing that the subject be shown to be likely to engage in sexual activity without utilizing contraceptive devices and is, therefore, likely to become impregnated. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Relevant Evidence. —

There is no statutory or constitutional authority for considering menstrual problems with respect to involuntary sterilization. The State's compelling interest is in the prevention of conception, not in the problem respondent's menstruation may pose for her, and certainly not in the problem it poses for her caretaker. Rather, the inquiry must focus on which method or surgical procedure for sterilization poses the least health risk and the least intrusion into respondent's bodily integrity. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Chapter 36A.

Trusts and Trustees.

Article 1.

Investment and Deposit of Trust Funds.

§ 36A-2. Investment; prudent man rule.

CASE NOTES

Stated in Church v. First Union Nat'l Bank, 63 N.C. App. 359, 304 S.E.2d 633 (1983).

Article 4.

Charitable Trusts.

§ 36A-53. Charitable Trusts Administration Act.

CASE NOTES

Applied in Board of Trustees v. Unknown & Unascertained Heirs, 64 N.C. App. 61, 306 S.E.2d 838 (1983).

Article 5.

Uniform Trusts Act.

§ 36A-74. Contracts of trustee.

CASE NOTES

Applied in Church v. First Union Nat'l Bank, 63 N.C. App. 359, 304 S.E.2d 633 (1983).

Chapter 38.

Boundaries.

§ 38-4. Surveys in disputed boundaries.

CASE NOTES

The amount of the allowance for the fees of the surveyor is within the discretion of the court, after considering the evidence as to the work done. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Unpaid Expenses. — A court which appoints a surveyor does not lack the authority to take heed of his request for unpaid expenses in the same case in which it appointed him, even though the surveyor is not a party to the underlying action. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Clerk Without Authority to Order Compensation. — Where in an action involving a boundary dispute a survey has been ordered and made, and the trial judge has failed to order compensation, the clerk has no authority to do so. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Correction of Order. — The trial court's failure to allow and tax costs could be considered an oversight or omission in an order, and since the substantive rights of the parties were not affected thereby, the court had authority under § 1A-1, Rule 60(a) to correct the inadvertent omission of costs from its order. Ward v. Taylor, — N.C. App. —, 314 S.E.2d 814 (1984).

Chapter 39.

Conveyances.

Article 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

CASE NOTES

The rule of construction in this section prevails over common-law rules to the extent that they conflict. Robinson v. King, — N.C. App. —, 314 S.E.2d 768 (1984).

Conveyance of Life Estate. — Under this section, the absence of words of inheritance, such as the use of the word "heir," combined with the presence of language limiting the estate to the term of the grantee's life, should be interpreted to convey a life estate. Robinson v. King, — N.C. App. —, 314 S.E.2d 768 (1984).

Where a quitclaim deed was ambiguous in that the granting clause gave all right, title, and interest to the grantee, while the habendum clause gave her the land "for and during the term of her natural life," the trial court properly held that the grantee acquired only a life estate under the deed. Robinson v. King, — N.C. App. —, 314 S.E.2d 768 (1984).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

CASE NOTES

This section does not apply, etc. — This section is inapplicable to a quitclaim deed that was executed in 1924. Robinson v. King, — N.C. App. —, 314 S.E.2d 768 (1984).

Article 2.

Conveyances by Husband and Wife.

§ 39-13.6. Control of real property held in tenancy by the entirety.

Legal Periodicals. —

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

Chapter 40A.

Eminent Domain.

Article 1.

General.

Sec.
40A-3. By whom right may be exercised.

ARTICLE 1.

General.

§ 40A-1. Exclusive provisions.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission as provided in G.S. 62-232.

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(1852, c. 92, s. 1; R. C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C. S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806, 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, inserted "public sewerage systems" in subdivision (a)(1).

Article 4.

Just Compensation.

§ 40A-63. In general.

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

Chapter 41.

Estates.

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

The signature card constitutes the contract, etc. —
In accord with 1983 Cumulative Supplement. See Myers v. Myers, — N.C. App. —, 314 S.E.2d 809 (1984).

Effect of Deposit into Joint Account. — A deposit by one spouse into an account in the names of both, standing alone, does not constitute a gift to the other; the depositor is still deemed to be the owner of the funds. Myers v. Myers, — N.C. App. —, 314 S.E.2d 809 (1984).

For a deposit by one spouse to constitute a gift to the other, there must be donative intent coupled with loss of dominion over the property; the donor must divest himself of all right and title to, and control of, the gift. Myers v. Myers, — N.C. App. —, 314 S.E.2d 809 (1984).

Liability for Wrongful Conversion. — This section and the signature card serve only to discharge the bank from liability to its depositors; they do not release one depositor to a joint account from liability to another for a withdrawal which constitutes wrongful conversion. Myers v. Myers, — N.C. App. —, 314 S.E.2d 809 (1984).

Action against Spouse for Conversion. — When one spouse deposits funds into a joint account with the other, the other is designated the depositor's agent, with authority to withdraw the funds. The depositing spouse, as principal, thus may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent. Myers v. Myers, — N.C. App. —, 314 S.E.2d 809 (1984).

Applied in Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983).

§ 41-10. Titles quieted.

CASE NOTES

I. GENERAL CONSIDERATION.

This section is liberally construed. —
This is a remedial statute and is to be liberally construed to advance the remedy and permit the courts to bring the parties to an issue. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

The beneficial purpose of this section. —
In accord with original. See Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

III. PLEADING AND PRACTICE.

A. In General.

Plaintiff Has Burden of Establishing Title. — In an action to quiet title, the burden of proof is on the plaintiff to establish his title. He may do so by traditional methods or by reliance on the Real Property Marketable Title Act, Chapter 47B. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Chapter 42.

Landlord and Tenant.

Article 1.

General Provisions.

§ 42-3. Term forfeited for nonpayment of rent.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.

CASE NOTES

Applied in Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

Article 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

CASE NOTES

I. APPLICATION AND SCOPE.

Stated in Satterfield v. Pappas, — N.C. App. —, 312 S.E.2d 511 (1984).

Chapter 43.

Land Registration.

Article 3.

Procedure for Registration.

§ 43-11. Hearing and decree.

CASE NOTES

Subsection (c) requires the trial judge to certify issues of fact for trial by jury upon demand of any party. Wilkinson v. Weyerhaeuser Corp., — N.C. App. —, 312 S.E.2d 531 (1984).

Chapter 44.

Liens.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

Sec.
44-51.8. Counties to which Article applies.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

CASE NOTES

No Provision for Lien Where Patient Settles with Wrongdoer. — While this section creates a lien in favor of any person, corporation or governmental body which has provided medical care, upon personal injury damages recovered in civil actions by patients who have received medical treatment, there is no provision for creation of a lien where the patient settles with the wrongdoer, instead of filing a civil action. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Cherokee, Chowan, Cleveland, Columbus, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 15, 1984, inserted a reference to Rowan County in the list of counties.

Chapter 44A.

Statutory Liens and Charges.

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Legal Periodicals. — For comment on materialmen's liens in North Carolina, see 61 N.C.L. Rev. 926 (1983).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

CASE NOTES

Right to file and enforce a lien claim and the right to resolve a dispute through arbitration are mutually exclusive rights. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

When Contractual Right to Arbitration Deemed Waived. — There are four situations in which a defendant may be deemed to have waived a contractual right to arbitration: (1) When parties pursue an action in court with neither party seeking to invoke a previously agreed upon arbitration clause, the trial judge may render a judgment on the merits, since the parties, by their conducts have impliedly waived their rights to arbitration; (2) when a civil action concerning alimony, child support, and custody is already filed and pending and there has been no prior agreement to arbitrate, the trial judge is without authority, even if the parties consent, to order arbitration; (3) when defendant did not demand arbitration within the applicable statutory time limit, defendant is barred from asserting his right to arbitration, and (4) when the defendant participates in litigation or takes other action inconsistent with the right to arbitration, so that plaintiff will be prejudiced if the court action is stayed and arbitration ordered, then the trial judge may find a waiver of arbitration rights. When determining, in the fourth situation, whether defendants' actions have prejudiced plaintiff, the question is one of reasonableness. Therefore, it is the duty of the trial judge to consider the situations of the parties, the nature of the transaction, and the facts of the particular case. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Plaintiff, by contractually agreeing to arbitration, did not thereby waive his right to file a lien claim and institute court action to enforce such lien. Such plaintiff is entitled to enforce any award in his favor through a judgment enforcing his lien claim. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Who Determines Waiver. — While some jurisdictions vest sole authority in the arbitrator to determine the issue of waiver, the Court of Appeal believes the arbitrator is the proper person only when the issue of waiver is intertwined with the substance of the parties dispute. When, in contrast, the issue of waiver is predicated upon participation in a lawsuit by a party seeking arbitration, the court believes it to be more practical and efficient for the trial judge to determine the waiver issue. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

§ 44A-12. Filing claim of lien.

CASE NOTES

Applied in RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

§ 44A-13. Action to enforce lien.

CASE NOTES

Right to file and enforce a lien claim and the right to resolve a dispute through arbitration are mutually exclusive rights. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

When Contractual Right to Arbitration Deemed Waived. — There are four situations in which a defendant may be deemed to have waived a contractual right to arbitration: (1) When parties pursue an action in court with neither party seeking to invoke a previously agreed upon arbitration clause, the trial judge may render a judgment on the merits, since the parties, by their conducts have impliedly waived their rights to arbitration; (2) when a civil action concerning alimony, child support, and custody is already filed and pending and there has been no prior agreement to arbitrate, the trial judge is without authority, even if the parties consent, to order arbitration; (3) when defendant did not demand arbitration within the applicable statutory time limit, defendant is barred from asserting his right to arbitration, and (4) when the defendant participates in litigation or takes other action inconsistent with the right to arbitration, so that plaintiff will be prejudiced if the court action is stayed and arbitration ordered, then the trial judge may find a waiver of arbitration rights. When determining, in the fourth situation, whether defendants' actions have prejudiced plaintiff, the question is one of reasonableness. Therefore, it is the duty of the trial judge to consider the situations of the parties, the nature of the transaction, and the facts of the particular case. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Plaintiff, by contractually agreeing to arbitration, did not thereby waive his right to file a lien claim and institute court action to enforce such lien. Such plaintiff is entitled to enforce any award in his favor through a judgment enforcing his lien claim. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Who Determines Waiver. — While some jurisdictions vest sole authority in the arbitrator to determine the issue of waiver, the Court of Appeal believes the arbitrator is the proper person only when the issue of waiver is intertwined with the substance of the parties dispute. When, in contrast, the issue of waiver is predicated upon participation in a lawsuit by a party seeking arbitration, the court believes it to be more practical and efficient for the trial judge to determine the waiver issue. Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Applied in RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

§ 44A-14. Sale of property in satisfaction of judgment enforcing lien or upon order prior to judgment; distribution of proceeds.

CASE NOTES

Applied in Adams v. Nelsen, — N.C. App. —, 312 S.E.2d 896 (1984).

Chapter 45.

Mortgages and Deeds of Trust.

Article 2A.

Sales under Power of Sale.

Part 2. Procedure for Sale.

Sec.
45-21.16. Notice and hearing.

Article 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definition.

CASE NOTES

This Article and §§ 1-339.1 to 1-339.40 Provide Exclusive Means of Foreclosure. — Foreclosure may be by judicial sale pursuant to §§ 1-339.1 through 1-339.40, or, if expressly provided in the deed or mortgage, by power of sale under this Article. These statutes provide the exclusive means for foreclosure in North Carolina and it was error for the trial court to provide for foreclosure in any other manner. Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall serve upon each party entitled to notice under this section a notice of hearing. The notice shall specify a time and place for a hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested; provided, that in those instances in which service by publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of the hearing; provided further, if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of hearing, which 20-day period may run concurrently with any other effort to effect service.

If all parties are not served in time to hold the hearing on the date stated in the notice of hearing, the clerk shall order it continued. All notices already served remain effective; when the mortgagee or trustee has satisfied the notice requirements of this section, the clerk shall notify all parties of the date to which the hearing has been continued. The clerk shall notify any party who has not received actual notice of the date to which the hearing has been continued by sending the notice by first class mail to his last known address.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, and book and page of the security instrument.

(2) The name and address of the holder of the security instrument, and if different from the original holder, his name and address.

(3) The nature of the default claimed.

(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.

(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.

(6) Repealed by Session Laws 1977, c. 359, s. 7.

(7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.

(8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.

(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.

(10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.

(11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.

(1975, c. 492, s. 2; 1977, c. 359, ss. 2-10; 1983, c. 335, s. 1; 1983 (Reg. Sess., 1984), c. 1108, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, added the second paragraph of subsection (a) and added subdivision (c)(11).

CASE NOTES

Evidence of Valid Debt. —

A party seeking to go forward with foreclosure under a power of sale must establish by competent evidence, the existence of a valid debt of which he is the holder. Connolly v. Potts, 63 N.C. App. 547, 306 S.E.2d 123 (1983).

Possession is significant in determining whether a person is a holder of a valid debt, and the absence of possession defeats that status. Connolly v. Potts, 63 N.C. App. 547, 306 S.E.2d 123 (1983).

Cited in In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475 (1983).

§ 45-21.32. Special proceeding to determine ownership of surplus.

CASE NOTES

Applied in RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

CASE NOTES

Common-law equitable principles to set aside a foreclosure sale are not affected by this section and § 45-21.35, which limit injunctive relief in foreclosure proceedings. Swindell v. Overton, — N.C. —, 314 S.E.2d 512 (1984).

§ 45-21.35. Ordering resales before confirmation; receivers for property; tax payments.

CASE NOTES

Comon-law equitable principles to set aside a foreclosure sale are not affected by this section and § 45-21.34, which limit injunctive relief in foreclosure proceedings. Swindell v. Overton, — N.C. —, 314 S.E.2d 512 (1984).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

CASE NOTES

Applied in FMS Mgt. Systems v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983).

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

CASE NOTES

To estop a cotenant from partitioning a piece of property, there must be an express or implied contract or agreement waiving the right to partition. Roberson v. Roberson, 65 N.C. App. 404, 309 S.E.2d 520 (1983).

§ 46-19. Confirmation and impeachment of report.

CASE NOTES

This section essentially governs two situations. First of all, in partition proceedings where there is no mistake, fraud, or collusion alleged, a party has 10 days from the filing of the commissioner's report to file an exception to the proposed partition. If no exception is filed, the report is confirmed. Clearly, the plaintiff, by filing no exception within the statutory time, cannot claim that this part of this section provides any method upon which relief might be granted. The second part of this section covers situations where a party is claiming that mistake, fraud, or collusion has occurred. In this instance, a party even after confirmation may impeach the proceedings. Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983).

Article 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

Applied in Duke v. Hill, — N.C. App. —, 314 S.E.2d 586 (1984).

§ 46-25. Sale of standing timber on partition; valuation of life estate.

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

Applied in Bridgers v. Bridgers, 62 N.C. App. 583, 303 S.E.2d 342 (1983).

§ 46-26. Sale of mineral interests on partition.

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

§ 46-28. Sale procedure.

CASE NOTES

Applied in Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983).

Chapter 47.

Probate and Registration.

ARTICLE 2.

Registration.

§ 47-27. Deeds of easements.

CASE NOTES

Stated in Waters v. North Carolina Phosphate Corp., — N.C. —, 312 S.E.2d 428 (1984).

ARTICLE 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-114. Payment of expenses incurred.

Legal Periodicals. — For article on the continuing power of attorney, see 5 Camp. L. Rev. 305 (1983).

Chapter 47A.

Unit Ownership.

ARTICLE 1.

Unit Ownership Act.

§ 47A-3. Definitions.

CASE NOTES

Each condominium unit is a separate lot even though unit owners may also own an undivided interest in common areas and facilities. This holding is in line with this Chapter, which treats a unit owner like any other owner of real property. Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 296 (1984).

§ 47A-5. Nature and incidents of unit ownership.

CASE NOTES

Condominium unit is a separate tract of property, distinct from the other units within the project. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 64 N.C. App. 682, 308 S.E.2d 452 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 296 (1984).

Apportionment of Blanket Lien. — When the condominium units are owned by different parties, the portion of a blanket lien applicable to each separate unit becomes material. It would be grossly inequitable to allow a blanket lien holder to enforce the entire lien against one unit of a multi-unit condominium project. Each unit shall be liable only for its proportionate share based upon the materials and labor furnished to that unit, and its proportionate part of labor and materials furnished the common area, under the contract that is the subject of the lien. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 64 N.C. App. 682, 308 S.E.2d 452 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 296 (1984).

Cited in Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983).

Chapter 47B.

Real Property Marketable Title Act.

§ 47B-1. Declaration of policy and statement of purpose.

CASE NOTES

Purpose. — The Real Property Marketable Title Act was enacted in an effort to expedite the alienation and marketability of real property. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

CASE NOTES

This section makes marketable record title, by its terms, subject to the matters stated in § 47B-3. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Cited in Pugh v. Davenport, 309 N.C. 628, 308 S.E.2d 292 (1983).

§ 47B-3. Exceptions.

CASE NOTES

Section 47B-2 makes marketable record title, by its terms, subject to the matters stated in this section. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Exceptions Serve to Protect against Extinguishment of Certain Rights. — The exceptions listed under this section do not serve as a sword to establish title in the party claiming a marketable title under the act but instead serve as a shield to protect from extinguishment the rights therein excepted. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Enumeration of exceptions in this section does not determine priority of one exception over the other. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Effect of Defendant's Possession on Rights of Ownership. — Whatever rights the defendants have because they are in possession of the property are not taken away by a competing marketable record title, but the mere fact of possession by the defendant does not alone establish their ownership of the land. Possession only protects whatever ownership the defendants already have on the date that marketability is to be determined. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Title Acquired by Adverse Possession Protected. — Where the defendants had acquired title to an undivided interest by adverse possession when the action was filed, their possession of the property on the date that marketability is to be determined (the date the action was filed), protects their rights as owners of the undivided interest. Thus, even if the plaintiffs had a marketable record title on that date under this Chapter, it could not affect or extinguish the defendants' title previously acquired by adverse possession because that title is an interest protected by subdivision (3) of this section. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Defendants' Rights as Cotenants Protected. — Possession by the defendants on the crucial date would not give the defendants title as to the plaintiffs' undivided interest in the property, but their right to possession of the property as cotenants, prior to partition or sale, would be protected. This is true under the general rule that each cotenant has the right to enter upon the land and to enjoy it jointly with the other cotenants. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Possession Protects "Interest" or "Estate" and "Right" to Possession. — Defendants' possession of the property at the time of commencement of the lawsuit protects, as against a competing marketable title, both their "interest" or "estate" in the property, that is, the undivided interest and their "right" to possession of the property but does not give them any title which they did not already have. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Subdivision (10) is similar, though not identical to § 2(d) of the Model Marketable Title Act. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

The "beginning of such 30-year period" in subdivision (10) of this section is the date of the title transaction purporting to create the interest claimed by the defendants upon which they rely as the basis for the marketability of their title and which was the most recent title transaction as of a date 30 years prior to the time when marketability is to be determined. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Vested remainder is a right, estate, interest and claim under subdivision (10) of this section. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Competing Title Not Extinguished if Created by Transaction Recorded after Beginning of Period. — Even though a party establishes a marketable record title to the property in question, it cannot extinguish a competing independent title if that competing title is created by a title transaction recorded after the beginning date for the establishment of the marketable record title. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Chapter 48.

Adoptions.

§ 48-2. Definitions.

CASE NOTES

"Willful" Defined. — The word "willful" means something more than an intention to do a thing. It implies doing the act purposely and deliberately. Clark v. Jones, — N.C. App. —, 313 S.E.2d 284 (1984).

Conduct Amounting to Abandonment. — A child has been "willfully abandoned" within the meaning of the statute when the conduct of the abandoning parent over the six-month period reveals a settled purpose and willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child. Clark v. Jones, — N.C. App. —, 313 S.E.2d 284 (1984).

§ 48-6. When consent of parents not necessary.

CASE NOTES

Standing to Attack Adoption. — Where it was apparent that child was begotten during the period of separation between her natural mother and her mother's husband which figured in the couple's divorce action as the basis of the court's judgment, the child had no standing in an action over 20 years later to attack her adoption on the grounds that her natural father was not made a party to the adoption proceedings, and that she herself was not represented by counsel or a guardian ad litem and did not give her consent to the adoption. Flinn v. Laughinghouse, — N.C. App. —, 315 S.E.2d 72 (1984).

§ 48-28. Questioning validity of adoption proceeding.

CASE NOTES

Attack on Adoption by Child. — This section clearly prohibits any direct or collateral attack in adoption proceedings except by a biological parent or guardian of the child. It makes no provision for attack by the child and nothing in the section requires that the child be represented by counsel or that a guardian ad litem be appointed. Flinn v. Laughinghouse, — N.C. App. —, 315 S.E.2d 72 (1984).

Where it was apparent that child was begotten during the period of separation between her natural mother and her mother's husband which figured in the couple's divorce action as the basis of the court's judgment, the child had no standing in an action over 20 years later to attack her adoption on the grounds that her natural father was not made a party to the adoption proceedings, and that she herself was not represented by counsel or a guardian ad litem and did not give her consent to the adoption. Flinn v. Laughinghouse, — N.C. App. —, 315 S.E.2d 72 (1984).

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

CASE NOTES

The implicit determination of paternity in a prosecution by the State under this Article when the defendant pled guilty should estop a county social services department from seeking a subsequent determination of paternity and an order to pay child support. Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

CASE NOTES

A person may be convicted for nonsupport of his illegitimate children only under this section. State v. Caudill, — N.C. App. —, 314 S.E.2d 592 (1984).

Jurisdiction. — Violation of this section is a misdemeanor over which the district court has exclusive original jurisdiction. Until a defendant is tried and convicted of this offense in district court and appeals to the superior court for a trial de novo, the superior court has no jurisdiction. State v. Caudill, — N.C. App. —, 314 S.E.2d 592 (1984).

§ 49-4. When prosecution may be commenced.

Legal Periodicals. — For survey of constitutional law in 1982, see 61 N.C.L. Rev. 1052 (1983).

CASE NOTES

Applied in State v. Caudill, — N.C. App. —, 314 S.E.2d 592 (1984).

§ 49-7. Issues and orders.

CASE NOTES

Issue of Paternity, etc. — In accord with 1983 Cum. Supp. See Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

CASE NOTES

Legitimation of Already-Legitimate Child Not Authorized by Section. — The clerk of superior court is without authority pursuant to this section to enter an order legitimating an already-legitimate child. In re Locklear, — N.C. App. —, 311 S.E.2d 691 (1984).

Nor Is Legitimating of Child Born to Married Woman. — The clerk of superior court has no jurisdiction under this section to enter an order legitimating a child born to a married woman. In re Locklear, — N.C. App. —, 311 S.E.2d 691 (1984).

§ 49-11. Effects of legitimation.

CASE NOTES

Cited in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

Legal Periodicals. — For survey of constitutional law in 1982, see 61 N.C.L. Rev. 1052 (1983).

CASE NOTES

Effect of Prior Determination in Action by County to Recover Support from Father. — A child's interests in having his paternity determined are not so identified with a county's interest in a prior action to recover from the father amounts paid by the county for child support that they were determinable in that action. The interest of the county, the real party in interest in the prior suit, was solely economic. The county was only interested in requiring the responsible parent to support the child and to recoup the amounts that it has paid for such support. It mattered not to the county whether this goal was achieved by a judgment against the present defendant or against her husband at the time her child was conceived. The child, to the contrary, has more at stake in the later suit seeking support from his father. The paternity adjudication will dramatically affect his personal interests. His interests in an accurate determination of paternity are at least equal to those of defendant, and the child's rights to support, inheritance, and custody are directly affected by the proceeding. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

Stated in State v. Caudill, — N.C. App. —, 314 S.E.2d 592 (1984).

Cited in Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); In re Locklear, — N.C. App. —, 311 S.E.2d 691 (1984).

§ 49-15. Custody and support of illegitimate children when paternity established.

Legal Periodicals. —
For survey of constitutional law in 1982, see 61 N.C.L. Rev. 1052 (1983).

CASE NOTES

Cited in Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

Chapter 50.

Divorce and Alimony.

Sec.
50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.

§ 50-2. Bond for costs unnecessary.

CASE NOTES

Applied in Mayer v. Mayer, — N.C. App. —, 311 S.E.2d 659 (1984).

§ 50-4. What marriages may be declared void on application of either party.

CASE NOTES

Void and Voidable Marriages Compared. — A voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Test of Mental Capacity to Contract to Marry. — As to what constitutes mental capacity or incapacity to enter into a contract to marry, the general rule is that the test is the capacity of the person to understand the special nature of the contract of marriage, and the duties and responsibilities which it entails, which is to be determined from the facts and circumstances of each case. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Test of Incompetency in Guardianship Matters Compared. — Tests judicially applied for a determination of incompetency in guardianship matters differ markedly from those applied for the determination of mental capacity to contract a marriage, for even though under guardianship as an incompetent, a person may have in fact sufficient mental capacity to validly contract marriage. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Capacity to Marry as Affected by Guardianship. — Unlike other transactions, an insane person's capacity to marry is not necessarily affected by guardianship. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Mental capacity of a party at the precise time when the marriage is celebrated controls its validity or invalidity. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Incapable of Contracting for Want of Understanding. — Under the common law as modified by § 51-3 and this section, a marriage of a person incapable of contracting for want of understanding is not void, but voidable. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Burden of Persuasion as to Invalidity. — When the fact of marriage has been established by evidence, the burden of persuasion on the issue of invalidity is on the party asserting such. And even if a party's insanity is proved to be of such a chronic nature that it is presumed to continue, it does not shift the burden of the issue. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

§ 50-5.1. Grounds for absolute divorce in cases of incurable insanity.

Legal Periodicals. — For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

§ 50-6. Divorce after separation of one year on application of either party.

Legal Periodicals. — For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

CASE NOTES

Effect of Resumption of Cohabitation on Separation Agreement. — Where a reconciliation and resumption of cohabitation has taken place, an order or separation agreement with provisions for future support and an agreement to live apart is necessarily abrogated. Williamson v. Williamson, — N.C. App. —, 311 S.E.2d 325 (1984).

Mutuality of Intent to Reconcile is Essential Where Evidence Conflicts. — When the evidence is conflicting, the issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation. Williamson v. Williamson, — N.C. App. —, 311 S.E.2d 325 (1984).

Resumption of the marital relation is not inherently secretive and spouses are competent to testify about it. Williamson v. Williamson, — N.C. App. —, 311 S.E.2d 325 (1984).

"Inclination and Opportunity" Rule Inapplicable to Proof of Resumption of Marital Relations. — The "inclination and opportunity" concept allows a presumption of adulterous sexual intercourse if adulterous inclination and opportunity are shown. The rule applies only to cases of alleged adultery, because adultery is an illegal act which by its very nature is difficult to prove. Such justification of the rule for adultery cases is nonexistent for proof of resumption of marital relations between separated spouses, an act which is not against the law but which merely breaks a contract between the spouses. Williamson v. Williamson, — N.C. App. —, 311 S.E.2d 325 (1984).

Defect in Jurisdiction Held Insignificant Since Either Party May Bring Proceeding. — Although the court improperly found jurisdiction over defendant, this error was insignificant in that this section allows a divorce proceeding on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

Applied in Mayer v. Mayer, — N.C. App. —, 311 S.E.2d 659 (1984).

§ 50-7. Grounds for divorce from bed and board.

CASE NOTES

Reconciliation Is Not a Defense. — A divorce from bed and board is judicial separation. Reconciliation while the action is pending is not a defense to a divorce from bed and board, unlike other concepts such as condonation — the forgiveness of a marital offense constituting a ground for divorce. Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

Resumption of Marital Relations. — If the parties reconcile and resume cohabitation as man and wife after a divorce from bed and board is granted, the effect of the divorce from bed and board is destroyed. No court action to end such divorce is necessary. Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

(1)

Acts Which Constitute Abandonment. — Although "abandonment" within the meaning of subsection (1) of this section is not subject to an all-embracing definition, one spouse abandons the other, within the meaning of the law, where he willfully brings the parties' cohabitation to an end without justification, without the consent of the other spouse, and without an intent to renew it. Roberts v. Roberts, — N.C. App. —, 314 S.E.2d 781 (1984).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

CASE NOTES

The word "residence" has been interpreted to mean the equivalent of "domicile." Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

To establish domicile, etc. —

In order to establish a domicile, a party must make a showing of both actual residence in the new locality and the intent to remain there permanently. Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

Plaintiff was properly found to be domiciled in North Carolina where: (1) plaintiff, a naval officer, changed his voter registration from Pennsylvania to Guilford County, (2) plaintiff filed a North Carolina income tax return for the year 1981, (3) plaintiff changed his permanent address with the Navy to his father's address in Greensboro as of August 1, 1981, (4) plaintiff opened a bank account in Greensboro in August of 1981 and maintained it since that time, (5) plaintiff changed the registration of his motor vehicle from Pennsylvania to North Carolina and has paid North Carolina property taxes, (6) plaintiff resided at his parents' house whenever on leave from the Navy, and (7) plaintiff severed all ties with the State of Pennsylvania. In short, plaintiff did everything possible to establish a residence in North Carolina. The transient nature of his career with the United States Navy prohibited him from doing anything further. Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

Cited in Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 313 S.E.2d 803 (1984).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.

The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury. Nothing herein shall require notice of trial to be given to a defendant who has not made an appearance in the action. The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C. S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4; 1971, c. 17; 1973, cc. 2, 460; 1981, c. 12; 1983 (Reg. Sess., 1984), c. 1037, s. 4.)

Effect of amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted the former last sentence, which read "On such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact," and made a change in the catchline.

CASE NOTES

Facts That Must Be Alleged, etc. — A divorce will be granted only after the facts establishing a statuory ground for divorce have been pleaded and actually proved. Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

Applied in Williamson v. Williamson, — N.C. App. —, 311 S.E.2d 325 (1984).

§ 50-11. Effects of absolute divorce.

CASE NOTES

Stated in Burmann v. Burmann, 64 N.C. App. 729, 308 S.E.2d 101 (1983).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

CASE NOTES

The welfare of the child, etc. —

The best interest of the child, in light of all the surrounding circumstances, is the paramount consideration which must guide the court in awarding custody of a minor child. Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983).

While it is true the law presumes that the best interest of a child will be served by committing it to the custody of a parent, when the parent is a suitable person, the welfare of the child is the paramount consideration to which all other factors, including common-law preferential rights of the parents, must be deferred or subordinated. Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

But Trial Court Has Wide Discretion. — In accord with 4th paragraph in 1983 Cum. Supp. See Plemmons v. Stiles, 65 N.C. App. 341 309 S.E.2d 504 (1983).

The trial judge has broad discretion in custody cases, since he has an opportunity to see and hear the parties and witnesses. His decision will not be disturbed on appeal, absent an abuse of discretion. Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983).

The trial judge is vested with broad discretion in child custody cases. The "paramount consideration" which limits this discretion is the welfare and needs of the children. Phillips v. Choplin, 65 N.C. App. 506, 309 S.E.2d 716 (1983).

Custody May Be Granted, etc. —

In accord with 1st paragraph in 1983 Cum. Supp. See Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983); Phillips v. Choplin, 65 N.C. App. 506, 309 S.E.2d 716 (1983).

In making custody decisions between a parent and a grandparent or other third party, the court must balance two doctrines. The first, the "parental right" doctrine, holds that ordinarily and in the absence of particular circumstances the custody of a child should be given to the parent in preference over the grandparent if the parent is found to be fit to have custody and can supply a proper home. The second doctrine, the "best interests of the child" doctrine, holds that "custody should be awarded in accordance with the best interests of the child regardless of the fitness of the parents." Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983).

Natural Parent Need Not Be Found Unfit to Award Custody to Third Person. — The court's discretion is such that it is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

Such Findings Are Conclusive, etc. —

That the findings of the trial judge regarding custody and support are conclusive when supported by competent evidence is true even when the evidence is conflicting. The standard for disturbing the trial judge's decision on appeal

being a clear showing of abuse of discretion. Dixon v. Dixon, — N.C. App. —, 312 S.E.2d 669 (1984).

Findings Must Be More Than Mere Conclusory Statements. — A custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child and custody orders are routinely vacated where the findings of fact consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. Dixon v. Dixon, — N.C. App. —, 312 S.E.2d 669 (1984).

Extensive Findings Insufficient When Not Supported by Evidence. — A custody order may contain extensive findings of fact and still be fatally defective — when the findings of fact are not supported by the evidence. Dixon v. Dixon, — N.C. App. —, 312 S.E.2d 669 (1984).

Any evidence of child abuse is of the utmost concern in determining whether granting custody to a particular party will best promote the interest and welfare of the child. Dixon v. Dixon, — N.C. App. —, 312 S.E.2d 669 (1984).

Evidence of Child Abuse Must Be Resolved in Findings. — The nature of child abuse, it being such a terrible fate to befall a child, obligates a trial court to resolve any evidence of it in its findings of fact. Dixon v. Dixon, — N.C. App. —, 312 S.E.2d 669 (1984).

Cited in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

§ 50-13.3. Enforcement of order for custody.

CASE NOTES

Jurisdiction. — Under North Carolina case law, matters of custody, which include visitation rights under this section, are pending until the death of one of the parties or the child reaches the age of majority. The hands of the courts would be effectively tied if they had no jurisdiction to enforce the orders they enter. Beck v. Beck, 64 N.C. App. 89, 306 S.E.2d 580 (1983).

Applied in Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

§ 50-13.4. Action for support of minor child.

CASE NOTES

Both parents have equal support duties under the law, absent pleading and proof that circumstances otherwise warrant. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Contribution Requirements under Subsection (b). — Subsection (b) of this section provides that mothers and fathers both share primary liability for the support of their minor children, thus imposing an equal legal duty on the parent of each gender, it neither mandates equal financial contributions nor requires any contribution from either party where it is proved that the circumstances otherwise warrant. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Effect of 1981 Amendment on Consideration of Relative Ability to Pay. — Although Session Laws 1981, c. 613 had the effect of changing the previous rule that the mother was only secondarily liable for child support, in all other relevant respects involving the relative ability or inability of the mother and father to provide such support, the relevant statutory provisions remained unchanged. Therefore other circumstances may properly be considered, including the relative ability of the parties to pay. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Discretion of Court as to Amount and Source of Support. — The trial court has considerable discretion in determining whether and in what amounts the party from whom support is sought may be ordered to provide it. Therefore, the trial court has a duty to exercise an informed and considered discretion with respect to the support obligation of the parties. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Determination of Relative Ability to Contribute Support. — The relative ability of the parties to contribute under subsections (b) and (c) of this section cannot depend solely on the determination of monthly available income after expenses. Rather, it must be reflective of all the relevant circumstances, including the

relative hardship to each parent in contributing to the reasonable needs of the child. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Child's Needs and Hardship to Each Parent Considered. — Enforcement of each parent's statutory duty to contribute child support depends on the urgency of the needs of the child and the relative hardship to each parent in contributing to these needs. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Apportionment of Costs Not Required Where Mother Unable to Assist in Support. — Although apportionment of the costs of a child's support between his father and mother according to their respective means and responsibilities is statutorily authorized, it is not required where the mother is financially unable to assist the father with the support of their son. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Basis for Order for Child Support. —

An order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

Conduct of Parties May Be Considered. —

In addition to the factors enumerated in subsection (c) of this section, the trial court may consider the conduct of the parties, the equities of a given case, and any other relevant facts in determining child support. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

Special Circumstances of the Parties. — What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

Ability to Pay Considered. —

An order for child support must contain findings and conclusions as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983).

In order to be fair and just, the court entering an order for child support must consider not only the needs of the child, but also the abilities of the parents to provide support. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Amount Should Be Fair and Not Confiscatory. — An order for the maintenance of a child should be in an amount that is fair and not confiscatory in light of the parent's earning ability. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Judge Must Make Findings, etc. —

Where the trial court sits without a jury, the judge is required to make factual findings specific enough to indicate to the appellate court that due regard was taken of the factors enumerated in this section. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

With regard to what the findings of fact concerning the needs of the minor children must contain, there are no set guidelines. The appellate courts of this State require only that the findings be based on competent evidence as to what the needs of the children are and that such findings sustain the conclusion that the support payments ordered are in such amount as to meet the reasonable needs of the child. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

The trial court must hear evidence on each of the factors listed in subsection (c) and substantiate its conclusions of law by making findings of specific facts on each of the listed factors. Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

To determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance, the court must make findings of specific facts as to what actual past expenditures have been. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

Support Order Vacated Absent Proof of Ability to Pay and Child's Needs. — An order for child support will necessarily be vacated where there is no evidence offered as to a party's ability to pay or where there is no evidence as to the child's needs and expenses. Dixon v. Dixon, — N.C. App. —, 312 S.E.2d 669 (1984).

Award Not Disturbed Unless, etc. —

In accord with 1st paragraph in 1983 Cum. Supp. See Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983); Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

Appellate Review, etc. —

An order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual findings specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. It is not enough that there may be evidence in the record sufficient to support findings which could have been made. Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

Standard for reviewing child support orders resembles that for reviewing awards of custody, in that the amount of child support allowed by the trial judge will be disturbed only when there is an abuse of discretion. Dixon v. Dixon, — N.C. App. —, 312 S.E.2d 669 (1984).

The determination of child support, etc. —

In accord with 1983 Cum. Supp. See Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983).

Claim for Retroactive Child Support. — Not only may an action be brought to collect child support payments in arrears, but a claim for retroactive child support may be brought under this section. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

The methods of payment listed in this section are not mutually exclusive. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

Applied in Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983); Champion v. Champion, 64 N.C. App. 606, 307 S.E.2d 827 (1983); Rustad v. Rustad, — N.C. App. —, 314 S.E.2d 275 (1984); Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

Stated in State v. Caudill, — N.C. App. —, 314 S.E.2d 592 (1984).

Cited in Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

§ 50-13.5. Procedure in actions for custody or support of minor children.

CASE NOTES

Jurisdiction of courts in custody, etc. — Where custody and support are brought to issue by the pleadings, the court retains continuing jurisdiction over these matters even when the issues are not determined by the judgment. Thus, where the issues of custody and support were raised in plaintiff wife's complaint and ruled on by the trial judge, the court retained jurisdiction to entertain and rule on defendant husband's motion in the cause for custody and support of the children. Jackson v. Jackson, — N.C. App. —, 315 S.E.2d 90 (1984).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

Required Facts Must Be Found and Proved. — Before attorney's fees can be taxed thereunder, the facts required by the statute — that (1) movant is acting in good faith, and (2) has insufficient means to defray the expenses of the suit — must be both alleged and proved. Allen v. Allen, 65 N.C. App. 86, 308 S.E.2d 656 (1983).

Before a court can award attorney's fees to an interested party under this section in a motion in the cause proceeding for a modification of child support, the court must make the following three findings of fact: (1) the party is acting in good faith; (2) the party has insufficient means to defray the expenses of the suit; and (3) the party ordered to pay support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. Quick v. Quick, — N.C. App. —, 313 S.E.2d 233 (1984).

The text of this section sets out four requirements to support an award of attorney's fees, namely: (1) that the party awarded fees be an interested party; (2) that that party be acting in good faith; (3) that that party have insufficient means to defray the expense of the suit; and (4) that the party ordered to furnish support have refused to provide adequate support under the circumstances existing at the time the action was instituted. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

Findings of Facts as Basis for Reasonableness. — As this section requires that awards of attorney's fees be reasonable, cases construing the statute have in effect annexed a fifth requirement concerning reasonableness onto the express statutory ones; namely, that the record must contain findings of fact upon which a determination of the requisite reasonableness can be based, for example, findings pertaining to the nature and scope of the legal

services rendered and the skill and time required. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

The amount awarded, etc. —

A trial judge is permitted to exercise considerable discretion in allowing or disallowing attorney's fees in child custody or support cases. Warner v. Latimer, — N.C. App. —, 314 S.E.2d 789 (1984).

Applied in Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983); Darden v. Darden, — N.C. App. —, 311 S.E.2d 600 (1984).

§ 50-13.7. Modification of order for child support or custody.

Legal Periodicals. —

For survey of 1982 family law, see 61 N.C.L. Rev. 1155 (1983).

CASE NOTES

Jurisdiction of Courts in Custody, etc. —

The purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. The support issue thus may be before the court on numerous occasions during a child's minority. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

Applied in Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540 (1983); O'Neal v. Wynn, 64 N.C. App. 149, 306 S.E.2d 822 (1983).

Cited in Phillips v. Choplin, 65 N.C. App. 506, 309 S.E.2d 716 (1983).

§ 50-13.9. Procedure to insure payment of child support.

Editor's Note. —

The historical citation to this section should read: "(1983, c. 677, s. 1.)"

§ 50-16.1. Definitions.

Applied in Roberts v. Roberts, — N.C. App. —, 314 S.E.2d 781 (1984).

§ 50-16.4. Counsel fees in actions for alimony.

Legal Periodicals. — For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

CASE NOTES

Elements to Be Considered. —

As a prerequisite for determination of an award of counsel fees, defendant must be entitled to the relief demanded, must be a dependent spouse and must have insufficient means to defray the necessary expense in prosecuting her claim. Roberts v. Roberts, — N.C. App. —, 314 S.E.2d 781 (1984).

Surplusage in Order of Court. — It was the trial court's duty, when presented with plaintiff's motion for an involuntary dismissal of defendant's request for attorneys' fees, to examine the quality of defendant's evidence and make a ruling on the merits; this the trial court did, denying defendant's motion. The additional language in the order indicating that the

motion for appellate attorneys' fees was dismissed without prejudice was without legal effect and would be regarded as mere surplusage. Whedon v. Whedon, — N.C. App. —, 314 S.E.2d 794 (1984).

§ 50-16.5. Determination of amount of alimony.

CASE NOTES

Where the husband testified that he is an able-bodied man and has the ability to provide ample support, this set at rest his ability to support his wife at the same level that she had become accustomed to during the marriage, since proof is not required for that which has been judicially admitted. Ahern v. Ahern, 63 N.C. App. 728, 306 S.E.2d 140 (1983).

Quoted in Whedon v. Whedon, — N.C. App. —, 314 S.E.2d 794 (1984).

Cited in Roberts v. Roberts, — N.C. App. —, 314 S.E.2d 781 (1984).

§ 50-16.6. When alimony not payable.

Legal Periodicals. —
For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

CASE NOTES

Applied in Wade v. Wade, 63 N.C. App. 189, 303 S.E.2d 634 (1983).

§ 50-16.9. Modification of order.

CASE NOTES

Reduction in Husband's Salary or Income. — The fact that the husband's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance. If the husband is able to make the payments as originally ordered notwithstanding the reduction in his income, and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree. Medlin v. Medlin, 64 N.C. App. 600, 307 S.E.2d 591 (1983).

§ 50-19. Maintenance of certain actions as independent actions permissible.

Legal Periodicals. —
For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

§ 50-20. Distribution by court of marital property upon divorce.

Legal Periodicals. —

For survey of 1982 family law, see 61 N.C.L. Rev. 1155 (1983).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

CASE NOTES

Public policy of this State is that equitable distribution of property shall follow decree of absolute divorce. Hendrix v. Hendrix, — N.C. App. —, 313 S.E.2d 25 (1984).

Effect on Separation Agreements. — This section did not purport to change the general validity of separation agreements or modify existing agreements. McArthur v. McArthur, — N.C. App. —, 315 S.E.2d 344 (1984).

Alternative Procedures for Making Application for Distribution. — Although § 50-21(a) sets out the procedure for making application for the distribution of property, it is not the only recognized way for married people to dispose of their marital property. An alternative is in subsection (d) of this section. Hendrix v. Hendrix, — N.C. App. —, 313 S.E.2d 25 (1984).

Court Has Broad Discretion. — Virtually all of the states which provide for equitable distribution have vested broad discretion in the trial courts, and indeed, such discretion is essential if fairness is to be achieved. The courts in this State have long recognized that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983).

Legislative intent to grant courts wide discretion in dividing marital property is indicated by (1) the language of subsection (c) of this section; (2) the existence of the 12 enumerated factors in the statute which the court is to consider in determining what will be an equitable division; (3) the existence of the catch-all factor in subdivision (c)(12) of this section whereby the court is permitted to consider "any other factor which the court finds to be just and proper"; and (4) the lack of any indication as to the quantum of evidence on each of the factors required to overcome the presumption. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983).

But Discretion Not Unlimited. — The courts do not have unlimited discretion in the division of marital property. The courts are limited by the presumption of equal division and by the requirement of subsection (j) of this section that they justify their distribution of property with written findings of fact. Furthermore, the exercise of discretion implies conscientious judgment arrived at in accordance with established rules, and not arbitrary action. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983).

Judgment Not Disturbed on Appeal Absent Abuse of Discretion. — The division of marital property is a matter within the sound discretion of the trial court, and its judgment should not be disturbed on review unless it is shown that the division made was an abuse of discretion. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983).

Abuse of discretion occurs when the trial court has failed to consider proper factors, has made a mistake or error with respect to the facts upon which the division was made, or when the division itself was, under the circumstances, either excessive or inadequate. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983).

Procedure under Subsection (c). — Under subsection (c) of this section, equitable distribution applies only to the net value of marital property. This requires the trial court to first ascertain what is marital property, then to find the net value of that property, and finally to make a distribution based upon the equitable goals of the statute and the various factors specified therein. Turner v. Turner, 64 N.C. App. 342, 307 S.E.2d 407 (1983).

Presumption of Equal Division. — The language of subsection (c) of this section that "there shall be an equal division . . . of marital property unless the court determines that an equal division is not equitable" establishes a presumption of equal division of the marital property. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983).

Applied in Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

Stated in Burmann v. Burmann, 64 N.C. App. 729, 308 S.E.2d 101 (1983).

§ 50-21. Procedures in actions for equitable distribution of property.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

Public policy of this State is that equitable distribution of property shall follow decree of absolute divorce. Hendrix v. Hendrix, — N.C. App. —, 313 S.E.2d 25 (1984).

Alternative Procedures for Making Application for Distribution. — Although subsection (a) of this section sets out the procedure for making application for the distribution of property, it is not the only recognized way for married people to dispose of their marital property. An alternative is in § 50-20(d). Hendrix v. Hendrix, — N.C. App. —, 313 S.E.2d 25 (1984).

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

Applied in Copeland v. Copeland, — N.C. App. —, 314 S.E.2d 297 (1984).

Cited in Beck v. Beck, 64 N.C. App. 89, 306 S.E.2d 580 (1983).

§ 50A-2. Definitions.

CASE NOTES

Applied in Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

§ 50A-3. Jurisdiction.

CASE NOTES

To meet the requirements of subdivision (a)(3)(ii) and § 50A-14(a), the following three questions must be answered affirmatively: (1) Did the foreign court lack jurisdiction under jurisdictional prerequisites similar to those of the Uniform Child Custody Jurisdiction Act, or, has the foreign court declined to exercise jurisdiction to modify the decree? (2) Was the child physically present in North Carolina? (3) Did an emergency situation exist? Naputi v. Naputi, — N.C. App. —, 313 S.E.2d 179 (1984).

Requirements of § 50A-14(a) Necessarily Include Those of This Section. — By requiring the court of the State seeking modification to have jurisdiction, the jurisdictional requirements of § 50A-14(a) necessarily include those of this section, which articulates the means by which North Carolina can acquire jurisdiction to render or modify a custody decree. Naputi v. Naputi, — N.C. App. —, 313 S.E.2d 179 (1984).

Fifteen-Month Period of Residence Sufficient for Jurisdiction. — There was sufficient evidence to support the court's exercise of jurisdiction pursuant to either subdivision (a)(1) or (2) of this section, where the minor child resided with the plaintiffs for an almost continuous 15-month period immediately preceding the commencement of the action. This was sufficient to qualify North Carolina as the minor child's home state. The child's brief visit to Texas during this time period was not sufficient to prevent such a conclusion. Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

Applied in Latch v. Latch, 63 N.C. App. 498, 305 S.E.2d 564 (1983); In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983); Copeland v. Copeland, — N.C. App. —, 314 S.E.2d 297 (1984).

Stated in Bryan v. Bryan, — N.C. App. —, 311 S.E.2d 313 (1984).

§ 50A-4. Notice and opportunity to be heard.

CASE NOTES

Applied in Beck v. Beck, 64 N.C. App. 89, 306 S.E.2d 580 (1983); Copeland v. Copeland, — N.C. App. —, 314 S.E.2d 297 (1984).

§ 50A-5. Service of notice.

CASE NOTES

Applied in Copeland v. Copeland, — N.C. App. —, 314 S.E.2d 297 (1984).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

Applied in Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

§ 50A-8. Jurisdiction declined by reason of conduct.

CASE NOTES

Applied in Bryan v. Bryan, — N.C. App. —, 311 S.E.2d 313 (1984).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

State Issuing Order Need Not Have Adopted UCCJA. — States which have adopted the Uniform Child Custody Jurisdiction Act must enforce an out-of-state custody order which substantially complies with the terms of the UCCJA, regardless of whether the state issuing the order has adopted the UCCJA. Copeland v. Copeland, — N.C. App. —, 314 S.E.2d 297 (1984).

§ 50A-14. Modification of custody decree of another state.

CASE NOTES

To meet the requirements of subsection (a) and § 50A-3(a)(3)(ii), the following three questions must be answered affirmatively: (1) Did the foreign court lack jurisdiction under jurisdictional prerequisites similar to those of the Uniform Child Custody Jurisdiction Act, or, has the foreign court declined to exercise jurisdiction to modify the decree? (2) Was the child physically present in North Carolina? (3) Did an emergency situation exist? Naputi v.

Naputi, — N.C. App. —, 313 S.E.2d 179 (1984).

Requirements of Subsection (a) Necessarily Include Those of § 50A-3. — By requiring the court of the State seeking modification to have jurisdiction, the jurisdictional requirements of subsection (a) of this section necessarily include those of § 50A-3, which articulates the means by which North Carolina can acquire jurisdiction to render or modify a custody decree. Naputi v. Naputi, — N.C. App. —, 313 S.E.2d 179 (1984).

Applied in Beck v. Beck, 64 N.C. App. 89, 306 S.E.2d 580 (1983).

Chapter 51.

Marriage.

Article 1.

General Provisions.

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Void and Voidable Marriages Compared. — A voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

What Constitutes Mental Capacity. — As to what constitutes mental capacity or incapacity to enter into a contract to marry, the general rule is that the test is the capacity of the person to understand the special nature of the contract of marriage, and the duties and responsibilities which it entails, which is to be determined from the facts and circumstances of each case. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Tests of Incompetency in Guardianship Matters Compared. — Tests judicially applied for a determination of incompetency in guardianship matters differ markedly from those applied for the determination of mental capacity to contract a marriage, for even though under guardianship as an incompetent, a person may have in fact sufficient mental capacity to validly contract marriage. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Capacity to Marry as Affected by Guardianship. — Unlike other transactions, an insane person's capacity to marry is not necessarily affected by guardianship. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Mental capacity of a party at the precise time when the marriage is celebrated controls its validity or invalidity. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Incapacity to Contract for Want of Understanding. — Under the common law as modified by this section and § 50-4, a marriage of a person incapable of contracting for want of understanding is not void, but voidable. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Burden of Persuasion as to Invalidity. — When the fact of marriage has been established by evidence, the burden of persuasion on the issue of invalidity is on the party asserting such. And even if a party's insanity is proved to be of such a chronic nature that it is presumed to continue, it does not shift the burden of the issue. Geitner ex rel. First Nat'l Bank v. Townsend, — N.C. App. —, 312 S.E.2d 236 (1984).

Equitable Estoppel to Attack Divorce. — Equitable estoppel is dependent upon events which led to the divorce or which may have occurred after the divorce. It is a personal disability of the party attacking the divorce judgment; it is not a function of the divorce decree itself. Mayer v. Mayer, — N.C. App. —, 311 S.E.2d 659 (1984).

Husband, who encouraged his wife to obtain a divorce from her prior spouse, is estopped from questioning its validity. This problem most commonly arises when a man persuades a married woman to divorce her husband so that she will be free to marry him. When he does so, or even when he merely marries her with full knowledge of the circumstances surrounding the divorce, he is estopped to question the validity of the divorce since he has engaged in conduct calculated to induce reliance on the divorce, and indeed, he has relied on it himself. Mayer v. Mayer, — N.C. App. —, 311 S.E.2d 659 (1984).

There is a difference between declaring a marriage valid and preventing one from

asserting its invalidity. The theory behind the equitable estoppel doctrine is not to make legally valid a void divorce or to make an invalid marriage valid, but rather, to prevent one from disrupting family relations by allowing one to avoid obligations as a spouse. Mayer v. Mayer, — N.C. App. —, 311 S.E.2d 659 (1984).

Applied in Wiseman v. Wiseman, — N.C. App. —, 314 S.E.2d 566 (1984).

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-10. Contracts between husband and wife generally; releases.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

§ 52-10.1. Separation agreements.

CASE NOTES

Separation agreements may not by their own terms promote objectives which are offensive to public policy. Sethness v. Sethness, 62 N.C. App. 676, 303 S.E.2d 424 (1983).

Because a separation agreement does not specifically prohibit "illicit intercourse" and cohabitation and may, by implication, even condone such acts, it does not therefore follow that the agreement promotes them. Whether the silence of a separation agreement on such issues renders it void as against public policy is a matter for legislative, not judicial, determination. Sethness v. Sethness, 62 N.C. App. 676, 303 S.E.2d 424 (1983).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-1. Short title.

CASE NOTES

This Chapter does not establish additional grounds for support; it produces additional means of enforcing support obligations already established. Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

§ 52A-9. How duties of support are enforced.

CASE NOTES

Legislative Intent. — The Legislature did not intend to limit the effect of this statute to obligors residing in this State. Rather, the Legislature intended to extend the obligations of an obligee without the suit for domestication of a foreign judgment when proper jurisdiction is present. Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

Broad Grant of Authority. — Because the State has an interest in the welfare and support of those persons living within its boundaries, the statute is broad in granting authority to bring suit for support, and grants authority to the official who prosecutes criminal actions for the State to appear on behalf of the obligee, although the action may also be brought by another. Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

§ 52A-29. Registration procedure; notice.

CASE NOTES

Personal jurisdiction is unnecessary, etc. —

Personal jurisdiction is not a requisite for registration of an order under this section. Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

The mere registration, etc. —

The registration provisions of this Chapter apply so as to allow enforcement in this State of foreign state support orders entered prior to October 1, 1975; transfer of an order to this State was a ministerial act ancillary to the entry of original judgment. Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

§ 52A-30. Effect of registration; enforcement procedure.

CASE NOTES

Personal jurisdiction is not a requisite for registration of an order under § 52A-29. Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

Ministerial Act. — The registration provisions of this chapter apply so as to allow enforcement in this State of foreign state support orders entered prior to October 1, 1975; transfer of an order to this State was a ministerial act ancillary to the entry of original judgment. Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

Chapter 53.

Banks.

Article 8.

Commissioner of Banks and State Banking Commission.

Sec.

53-93.1. (Effective July 1, 1985) Deputy commissioner.

Article 17.

North Carolina Regional Reciprocal Banking Act.

53-209. Title.
53-210. Definitions.
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Article 18.

Bank Holding Company Act of 1984.

53-225. Title and scope.
53-226. Definitions.
53-227. Registration of bank holding companies.
53-228. Cease and desist.
53-229. Acquisition and control of certain nonbank banking institutions.
53-230. Rules.
53-231. Appeal of Commissioner's decision.
53-232. Fees.

Article 2.

Creation.

§ 53-12. Merger or consolidation of banks.

CASE NOTES

Quoted in Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

§ 53-13. Merged or consolidated banks deemed one bank.

CASE NOTES

Right to Enforce Claim after Merger. — In a bank merger, the surviving bank or its transferee has the legal right to enforce a claim because the surviving bank succeeds to the merged bank's holder status by operation of law. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

Article 8.

Commissioner of Banks and State Banking Commission.

§ 53-93.1. (Effective July 1, 1985) Deputy commissioner.

The Commissioner of Banks shall appoint, with approval of the Governor, and may remove at his discretion a deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner of Banks, or in case the office of commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner of Banks. He shall receive such compensation as shall be fixed by the General Assembly in the Current Operations Appropriations Act.

Irrespective of the conditions under which the deputy commissioner may exercise the powers and perform the duties of the Commissioner of Banks, pursuant to the preceding paragraph, such deputy commissioner, in addition thereto, is hereby authorized and empowered at any and all times, at the discretion of the Commissioner of Banks, to perform such duties and exercise such powers of the Commissioner of Banks in the name of and on behalf of the Commissioner as the Commissioner, in his discretion, may direct.

This section is not to be construed to modify the provisions of G.S. 53-97. (1959, c. 273; 1983, c. 717, s. 8; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Section 53-97, referred to in this section, was repealed by Session Laws 1983, c. 328, s. 4. As to the filling of vacancies in the office of the Commissioner of Banks, see now § 53-92.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in the first paragraph of this section.

Article 15.

North Carolina Consumer Finance Act.

§ 53-168. License required; showing of convenience, advantage and financial responsibility; investigation of applicants; hearings; existing businesses; contents of license; transfer; posting.

Legal Periodicals. — For survey of 1982 law on commercial law, see 61 N.C.L. Rev. 1018 (1983).

§ 53-176.1. Motor vehicle lenders.

Legal Periodicals. — For survey of 1982 law on commercial law, see 61 N.C.L. Rev. 1018 (1983).

ARTICLE 17.

North Carolina Regional Reciprocal Banking Act.

§ 53-209. Title.

This Article shall be known and may be cited as the North Carolina Regional Reciprocal Banking Act. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1113, s. 4, makes this Article effective January 1, 1985.

Session Laws 1983 (Reg. Sess., 1984), c. 1113, s. 3, provides:

"The question of the extent of authority beyond that conferred by Article 17 upon the Commissioner of Banks with regard to the acquisition of a North Carolina bank or bank holding company by an out-of-State regional banking holding company is referred to the Committee on Taxation and Regulation of Banks, Savings and Loan Associations, and Credit Unions of the Legislative Research Commission for study and report to the 1985 Session of the General Assembly."

§ 53-210. Definitions.

Notwithstanding any other section of this Chapter, for the purposes of this Article:

(1) "Acquire" means:
   a. The merger or consolidation of one bank holding company with another bank holding company;
   b. The acquisition by a bank holding company of direct or indirect ownership or control of voting shares of another bank holding company or a bank, if, after such acquisition, the bank holding company making the acquisition will directly or indirectly own or control more than five percent (5%) of any class of voting shares of the other bank holding company or the bank;
   c. The direct or indirect acquisition by a bank holding company of all or substantially all of the assets of another bank holding company or of a bank; or
   d. Any other action that would result in direct or indirect control by a bank holding company of another bank holding company or a bank.

(2) "Bank" means any "insured bank" as such term is defined in Section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)) or any institution eligible to become an "insured bank" as such term is defined therein, which, in either event,
   a. Accepts deposits that the depositor has a legal right to withdraw on demand; and
   b. Engages in the business of making commercial loans.

(3) "Banking office" means the principal office of a bank, any branch of a bank, any teller's window of a bank or any other office at which a bank accepts deposits: Provided, however, that "banking office" shall not mean:
   a. Unmanned automatic teller machines, point of sale terminals or other similar unmanned electronic banking facilities at which deposits may be accepted;
   b. Offices located outside the United States; or
   c. Loan production offices, representative offices or other offices at which deposits are not accepted.

(4) "Bank holding company" has the meaning set forth in Section 2(a) (1) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1841(a) (1)).

(5) "Commissioner" means the Commissioner of Banks of this State.
(6) "Control" has the meaning set forth in Section 2(a) (2) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1841(a)(2)).
(7) "Deposits" means all demand, time, and savings deposits, without regard to the location of the depositor: Provided, however, that "deposits" shall not include any deposits by banks. For purposes of this Article, determination of deposits shall be made with reference to regulatory reports of condition or similar reports made by or to state and federal regulatory authorities.
(8) "North Carolina bank" means a bank that:
a. Is organized under the laws of this State or of the United States; and
b. Has banking offices located only in this State.
(9) "North Carolina bank holding company" means a bank holding company:
a. That has its principal place of business in this State;
b. The North Carolina bank and regional bank subsidiaries of which hold more than eighty percent (80%) of the total deposits held by all of its bank subsidiaries, other than bank subsidiaries controlled by it in accordance with G.S. 53-212 of this Article; and
c. That is not controlled by a bank holding company other than a North Carolina bank holding company.
(10) "Principal place of business" of a bank holding company means the state in which the total deposits held by the banking offices of the bank holding company's bank subsidiaries are the largest.
(11) "Region" means the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia, and the District of Columbia.
(12) "Regional bank" means a bank that:
a. Is organized under the laws of the United States or of one of the states in the region other than North Carolina; and
b. Has banking offices located only in states within the region.
(13) "Regional bank holding company" means a bank holding company:
a. That has its principal place of business in a state within the region other than North Carolina;
b. The regional bank and North Carolina bank subsidiaries of which hold more than eighty percent (80%) of the total deposits held by all of its bank subsidiaries, other than bank subsidiaries controlled by it in accordance with G.S. 53-212 of this Article;
c. That is not controlled by a bank holding company other than a regional bank holding company; and
d. That neither is controlled by nor is a foreign bank as defined in the International Banking Act of 1978 (12 U.S.C. 3101(7)).
(14) "State" means any state of the United States or the District of Columbia.
(15) "Subsidiary" has the meaning set forth in Section 2(d) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1841(d)). (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-211. Acquisitions by regional bank holding companies.

(a) A regional bank holding company that does not have a North Carolina bank subsidiary (other than a North Carolina bank subsidiary that was acquired either pursuant to Section 116 or Section 123 of the Garn-St Germain

Depository Institutions Act of 1982 (12 U.S.C. 1730a(m), 1823(f)) or in the regular course of securing or collecting a debt previously contracted in good faith, as provided in Section 3(a) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1842(a))) may acquire a North Carolina bank holding company or a North Carolina bank with the approval of the Commissioner. The regional bank holding company shall submit to the Commissioner an application for approval of such acquisition, which application shall be approved only if:

(1) The Commissioner determines that the laws of the state in which the regional bank holding company making the acquisition has its principal place of business permit all North Carolina bank holding companies to acquire banks and bank holding companies in that state;

(2) The Commissioner determines that the laws of the state in which the regional bank holding company making the acquisition has its principal place of business permit such regional bank holding company to be acquired by the North Carolina bank holding company or North Carolina bank sought to be acquired. For the purposes of this subsection, a North Carolina bank shall be treated as if it were a North Carolina bank holding company;

(3) The Commissioner determines either that the North Carolina bank sought to be acquired has been in existence and continuously operating for more than five years or that all of the bank subsidiaries of the North Carolina bank holding company sought to be acquired have been in existence and continuously operating for more than five years: Provided, that the Commissioner may approve the acquisition by a regional bank holding company of all or substantially all of the shares of a bank organized solely for the purpose of facilitating the acquisition of a bank that has been in existence and continuously operating as a bank for more than five years; and

(4) The Commissioner makes the acquisition subject to any conditions, restrictions, requirements or other limitations that would apply to the acquisition by a North Carolina bank holding company of a bank or bank holding company in the state where the regional bank holding company making the acquisition has its principal place of business but that would not apply to the acquisition of a bank or bank holding company in such state by a bank holding company all the bank subsidiaries of which are located in that state.

(b) A regional bank holding company that has a North Carolina bank subsidiary (other than a North Carolina bank subsidiary that was acquired either pursuant to Section 116 or Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m), 1823(f)) or in the regular course of securing or collecting a debt previously contracted in good faith, as provided in Section 3(a) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1842(a))) may acquire any North Carolina bank or North Carolina bank holding company with the approval of the Commissioner. The regional bank holding company shall submit to the Commissioner an application for approval of such acquisition, which application shall be approved only if:

(1) The Commissioner determines either that the North Carolina bank sought to be acquired has been in existence and continuously operating for more than five years or that all of the bank subsidiaries of the North Carolina bank holding company sought to be acquired have been in existence and continuously operating for more than five years: Provided, that the Commissioner may approve the acquisition by a regional bank holding company of all or substantially all of the shares of a bank organized solely for the purpose of facilitating the acquisition of a bank that has been in existence and continuously operating as a bank for more than five years; and

(2) The Commissioner makes the acquisition subject to any conditions, restrictions, requirements or other limitations that would apply to the acquisition by a North Carolina bank holding company of a bank or bank holding company in the state where the regional bank holding company making the acquisition has its principal place of business but that would not apply to the acquisition of a bank or bank holding company in such state by a bank holding company all the bank subsidiaries of which are located in that state.

(c) The Commissioner shall rule on any application submitted under this section not later than 90 days following the date of submission of a complete application. If the Commissioner fails to rule on the application within the requisite 90-day period, the failure to rule shall be deemed a final decision of the Commissioner approving the application. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-212. Exceptions.

A North Carolina bank holding company, a North Carolina bank, a regional bank holding company, or a regional bank may acquire or control, and shall not cease to be a North Carolina bank holding company, a North Carolina bank, a regional bank holding company, or a regional bank, as the case may be, by virtue of its acquisition or control of:

(1) A bank having banking offices in a state not within the region, if such bank has been acquired pursuant to the provisions of Section 116 or Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m), 1823(f));

(2) A bank having banking offices in a state not within the region, if such bank has been acquired in the regular course of securing or collecting a debt previously contracted in good faith, as provided in Section 3(a) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1842(a)), and if the bank or bank holding company divests the securities or assets acquired within two years of the date of acquisition. A North Carolina bank, a North Carolina bank holding company, a regional bank holding company, or a regional bank may retain these interests for up to three additional periods of one year each if the Commissioner determines that the required divestiture would create undue financial difficulties for that bank or bank holding company; or

(3) A bank or corporation organized under the laws of the United States or of any state and operating under Section 25 or Section 25(a) of the Federal Reserve Act as amended (12 U.S.C. 601 or 611-31) or a bank or bank holding company organized under the laws of a foreign country that is principally engaged in business outside the United States and that either has no banking office in the United States or has banking offices in the United States that are engaged only in business activities permissible for a corporation operating under Section 25 or Section 25(a) of the Federal Reserve Act as amended. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-213. Prohibitions.

(a) Except as expressly permitted by federal law, no bank holding company that is not either a North Carolina bank holding company or a regional bank holding company shall acquire a North Carolina bank holding company or a North Carolina bank.

(b) Except as required by federal law, a North Carolina bank holding company or a regional bank holding company that ceases to be a North

Carolina bank holding company or a regional bank holding company shall as soon as practicable and, in all events, within one year after such event divest itself of control of all North Carolina bank holding companies and all North Carolina banks: Provided, however, that such divestiture shall not be required if the North Carolina bank holding company or the regional bank holding company ceases to be a North Carolina bank holding company or a regional bank holding company, as the case may be, because of an increase in the deposits held by bank subsidiaries not located within the region and if such increase is not the result of the acquisition of a bank or bank holding company. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-214. Applicable laws, rules and regulations.

(a) Any North Carolina bank that is controlled by a bank holding company that is not a North Carolina bank holding company shall be subject to all laws of this State and all rules and regulations under such laws that are applicable to North Carolina banks that are controlled by North Carolina bank holding companies.

(b) Notwithstanding the provisions of G.S. 53-95, the Commissioner may promulgate rules, including the imposition of a reasonable application and administration fee, to implement and effectuate the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-215. Appeal of Commissioner's decision.

Notwithstanding any other provision of law, any aggrieved party in a proceeding under G.S. 53-211 or G.S. 53-212(2) may, within 30 days after final decision of the Commissioner and by written notice to the Commissioner, appeal directly to the North Carolina Court of Appeals for judicial review on the record. In the event of an appeal, the Commissioner shall certify the record to the Clerk of the Court of Appeals within 30 days after filing of the appeal. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-216. Periodic reports; interstate agreements.

The Commissioner may from time to time require reports under oath in such scope and detail as he may reasonably determine of each regional bank holding company subject to this Article for the purpose of assuring continuing compliance with the provisions of this Article.

The Commissioner may enter into cooperative agreements with other bank regulatory authorities for the periodic examination of any regional bank holding company that has a North Carolina bank subsidiary and may accept reports of examination and other records from such authorities in lieu of conducting its own examinations. The Commissioner may enter into joint actions with other bank regulatory authorities having concurrent jurisdiction over any regional bank holding company that has a North Carolina bank subsidiary or may take such actions independently to carry out its responsibilities under this Article and assure compliance with the provisions of this Article and the applicable banking laws of this State. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-217. Enforcement.

The Commissioner shall have the power to enforce the provisions of this Article, including the divestiture requirement of G.S. 53-213(b), through an action in any court of this State or any other state or in any court of the United States, as provided in G.S. 53-94 and G.S. 53-134, for the purpose of obtaining an appropriate remedy for violation of any provision of this Article, including

such criminal penalties as are contemplated by G.S. 53-134. (1983 (Reg. Sess., 1984), c. 1113. s. 1.)

§ 53-218. Nonseverability.

It is the purpose of this Article 17 to facilitate orderly development of banking organizations that have banking offices in more than one state within the region. It is not the purpose of this Article to authorize acquisitions of North Carolina bank holding companies or North Carolina banks by bank holding companies that do not have their principal place of business in this State on any basis other than as expressly provided in this Article. Therefore, if any portion of this Article pertaining to the terms and conditions for and limitations upon acquisition of North Carolina bank holding companies and North Carolina banks by bank holding companies that do not have their principal place of business in this State is determined to be invalid for any reason by a final nonappealable order of any North Carolina or federal court of competent jurisidiction, then this entire Article shall be null and void in its entirety and shall be of no further force or effect from the effective date of such order: Provided, however, that any transaction that has been lawfully consummated pursuant to this Article prior to a determination of invalidity shall be unaffected by such determination. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§§ 53-219 to 53-224: Reserved for future codification purposes.

Article 18.

Bank Holding Company Act of 1984.

§ 53-225. Title and scope.

(a) This Article shall be known and may be cited as the North Carolina Bank Holding Company Act of 1984.

(b) This Article provides for the registration of bank holding companies in North Carolina. Nothing contained in this Article shall be deemed to apply to the registration, examination or supervision of banks or trust companies.

(c) Actions by the Commissioner under this Article shall not be subject to review by the State Banking Commission but shall be reviewable pursuant to G.S. 53-231. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1113, s. 4, makes this article effective July 7, 1984.

§ 53-226. Definitions.

For the purposes of this Article:

(1) "Bank" means any insured bank as the term is defined in Section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. Section 1813(h)), or any institution eligible to become an insured bank as the term is defined therein, which, in either event:

a. Accepts deposits that the depositor has a legal right to withdraw on demand; and

b. Engages in the business of making commercial loans.

(2) "Bank holding company" means any company which has control over any bank.
(3) "Commissioner" means the Commissioner of Banks of this State.
(4) "Company" means a corporation, joint stock company, business trust, partnership, voting trust, association, and any similar organized group of persons, whether incorporated or not, and whether or not organized under the laws of this State or any other state or any territory or possession of the United States or under the laws of the foreign country, territory, colony or possession thereof, other than a corporation all the capital of which is owned by the United States or a corporation which is chartered by the Congress of the United States; "company" includes subsidiary and parent companies.
(5) "Control" means that:
a. Any company directly or indirectly or acting through one or more persons owns, controls, or has power to vote twenty-five per centum (25%) or more of the voting securities of the bank;
b. The company controls in any manner the election of a majority of the directors, managers or trustees of the bank or company; or
c. The Commissioner determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.
(6) "Subsidiary", with respect to a bank holding company, means:
a. Any company twenty-five per centum (25%) or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is held by it with power to vote;
b. Any company the election of a majority of whose directors is controlled in any manner by a bank holding company; or
c. Any company with respect to the management or policies of which a bank holding company has the power, directly or indirectly, to exercise control, as determined by the Commissioner.
(7) For the purposes of any proceeding under subdivisions (5)c. and (6)c. of this section, there is a presumption that any company which directly or indirectly owns, controls, or has power to vote less than five percent (5%) of any class of voting securities of a given bank or company does not have control over that bank or company. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-227. Registration of bank holding companies.

Every bank holding company, not later than July 1, 1985, or within 180 days after becoming a bank holding company controlling a North Carolina federally or State-chartered bank or banks, or within 180 days after acquiring control over a nonbank subsidiary or subsidiaries having offices located in this State shall register with the Commissioner on forms approved by the Commissioner. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-228. Cease and desist.

Upon a finding that any action of a bank holding company or nonbank subsidiary subject to this Article may be in violation of any North Carolina banking law, the Commissioner, after a reasonable notice to the bank holding company or its nonbank subsidiary and an opportunity for it to be heard, shall have the authority to order it to cease and desist from such action. If the bank holding company or nonbank subsidiary fails to appeal such decision in accor-

dance with G.S. 53-231 hereof and continues to engage in such action in violation of the Commissioner's order to cease and desist such action, it shall be subject to a penalty of one thousand dollars ($1,000), to be recovered with costs by the Commissioner in any court of competent jurisdiction in a civil action prosecuted by the Commissioner. The penalty provision of this section shall be in addition to and not in lieu of any other provision of law applicable to a bank holding company's or its nonbank subsidiary's failure to comply with an order of the Commissioner. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-229. Acquisition and control of certain nonbank banking institutions.

Notwithstanding any other provision of this Article or any other provision of the General Statutes of this State, no bank holding company or any other company may acquire or control any banking institution that:

(1) Has offices located in this State; and

(2) Is not a bank as defined in G.S. 53-226(1) of this Article.

For purposes of this section, "company" means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within 25 years or not later than 21 years and 10 months after the death of individuals living on the effective date of the trust, and "banking institution" means any institution organized under Article 2 of Chapter 53 (G.S. 53-2, et seq.) or Article 11 of Chapter 53 (G.S. 53-136, et seq.) of the General Statutes of this State or under Chapter 2 of Title 12 of the United States Code (12 U.S.C. § 21, et seq.). Provided, the provisions of G.S. 53-229 shall not apply to applications by any company which is chartered by the Congress of the United States and which application is pending before the Commissioner on July 7, 1984. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-230. Rules.

Notwithstanding the provision of G.S. 53-95, the Commissioner may promulgate such reasonable rules as may be necessary to effectuate the purposes of this Article. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-231. Appeal of Commissioner's decision.

Notwithstanding any other provision of law, any aggrieved party may, within 30 days after final decision of the Commissioner and by written notice to the Commissioner, appeal directly to the North Carolina Court of Appeals for judicial review on the record. In the event of an appeal, the Commissioner shall certify the record to the Clerk of the Court of Appeals within 30 days thereafter. Such record shall include all memoranda, briefs and any other documents, data, information or evidence submitted by any party to such proceeding except for material such as trade secrets normally not available through commercial publication for which such party has made a claim of confidentiality and requested exclusion from the record which the Commissioner deems confidential. All factual information contained in any report of examination or investigation submitted to or obtained by the Commissioner's staff shall also be made a part of the record unless deemed confidential by the Commissioner. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

§ 53-232. Fees.

Each bank holding company subject to this act shall pay the following fees:

(1) An initial registration fee of $1,000.

(2) An annual registration fee of $750.00.

(3) A fee of $50.00 for the issuance of any certified copies of documents plus $1.00 per page over a number of pages specified by the Commissioner.

(1983 (Reg. Sess., 1984), c. 1113, s. 1.)

Chapter 54.

Cooperative Organizations.

SUBCHAPTER III. CREDIT UNIONS.

ARTICLE 14F.

Savings Accounts.

§ 54-109.59. Liens.

CASE NOTES

Applicability of Section. — This section gives credit unions the opportunity to obtain a lien on their borrowers' funds but the lien is not complete until the deposit is actually made. Reynolds v. N.C. State Employees Credit Union, 31 Bankr. 296 (Bankr. E.D.N.C. 1983).

Chapter 54B.

Savings and Loan Associations.

Article 3.

Fundamental Changes.

Sec.
54B-45 to 54B-48. [Reserved.]

Article 3A.

North Carolina Regional Reciprocal Savings and Loan Acquisition Act.

54B-48.1. (For effective date see note) Title.
54B-48.2. (For effective date see note) Definitions.
54B-48.3. (For effective date see note) Acquisitions by Southern Region savings and loan holding companies and Southern Region associations.
54B-48.4. (For effective date see note) Exceptions.
54B-48.5. (For effective date see note) Prohibitions.
Sec.
54B-48.6. (For effective date see note) Applicable laws, rules and regulations.
54B-48.7. (For effective date see note) Appeal of Administrator's decision.
54B-48.8. (For effective date see note) Periodic reports; interstate agreements.
54B-48.9. (For effective date see note) Enforcement.
54B-49 to 54B-51. [Reserved.]

Article 11.

Foreign Associations.

54B-221 to 54B-235. [Repealed.]

Article 13.

Savings and Loan Holding Companies.

54B-261. (For effective date see note) Savings and loan holding companies.

Article 3.

Fundamental Changes.

§§ 54B-45 to 54B-48: Reserved for future codification purposes.

Article 3A.

North Carolina Regional Reciprocal Savings and Loan Acquisition Act.

(For Effective Date See Notes Below)

§ 54B-48.1. (For effective date see note) Title.

This Article shall be known and may be cited as the North Carolina Regional Reciprocal Savings and Loan Acquisition Act. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 3, provides:

"Nonseverability. It is the purpose of this Article to facilitate orderly development of thrift organizations that have branch offices in more than one state within the Southern Region. It is not the purpose of this Article to authorize acquisitions of North Carolina savings and loan holding companies or North Carolina associations by savings and loan holding companies that do not have their prin-

cipal place of business in this State on any basis other than as expressly provided in this Article. Therefore, if any portion of this Article pertaining to the terms and conditions for and limitations upon acquisition of North Carolina savings and loan holding companies and North Carolina associations by savings and loan holding companies that do not have their principal place of business in this State is determined to be invalid for any reason by a final nonappealable order of any North Carolina or federal court of competent jurisdiction, then this entire Article shall be null and void in its entirety and shall be of no further force or effect from the effective date of such order: Provided, however, that any transaction that has been lawfully consummated pursuant to this Article prior to a determination of invalidity shall be unaffected by such determination."

§ 54B-48.2. (For effective date see note) Definitions.

Notwithstanding the provisions of G.S. 54B-4, as used in this Article, unless the context requires otherwise:

(1) "Acquire", as applied to an association or a savings and loan holding company, means any of the following actions or transactions:
   a. The merger or consolidation of an association with another association or savings and loan holding company or a savings and loan holding company with another savings and loan holding company.
   b. The acquisition of the direct or indirect ownership or control of voting shares of an association or savings and loan holding company if, after the acquisition, the acquiring association or savings and loan holding company will directly or indirectly own or control more than five percent (5%) of any class of voting shares of the acquired association or savings and loan holding company.
   c. The direct or indirect acquisition of all or substantially all of the assets of an association or savings and loan holding company.
   d. The taking of any other action that would result in the direct or indirect control of an association or savings and loan holding company.

(2) "Administrator" means the Administrator of the Savings and Loan Division.

(3) "Association" means a mutual or capital stock savings and loan association, building and loan association or savings bank chartered under the laws of any one of the states or by the Federal Home Loan Bank Board, pursuant to the "Home Owners' Loan Act of 1933", 12 U.S.C. Section 1464, as amended.

(4) "Branch office" means any office at which an association accepts deposits. The term branch office does not include:
   a. Unmanned automatic teller machines, point-of-sale terminals, or similar unmanned electronic banking facilities at which deposits may be accepted;
   b. Offices located outside the United States; and
   c. Loan production offices, representative offices, service corporation offices, or other offices at which deposits are not accepted.

(5) "Company" means that which is set forth in the Federal Savings and Loan Holding Company Act, 12 U.S.C. Section 1730a(a)(1)(C), as amended.

(6) "Control" means that which is set forth in the Federal Savings and Loan Holding Company Act, 12 U.S.C. Section 1730a(a)(2), as amended.

(7) "Deposits" means all demand, time, and savings deposits, without regard to the location of the depositor: Provided, however, that "deposits" shall not include any deposits by associations. For purposes of this Article, determination of deposits shall be made with reference

to regulatory reports of condition or similar reports made by or to State and federal regulatory authorities.

(8) "Federal association" means an association chartered by the Federal Home Loan Bank Board pursuant to the "Home Owners' Loan Act of 1933", 12 U.S.C. Section 1464, as amended.

(9) "North Carolina association" means an association organized under the laws of the State of North Carolina or under the laws of the United States and that:

a. Has its principal place of business in the State of North Carolina;

b. Which if controlled by an organization, the organization is either a North Carolina association, Southern Region association, North Carolina savings and loan holding company, or a Southern Region savings and loan holding company; and

c. More than eighty percent (80%) of its total deposits, other than deposits located in branch offices acquired pursuant to Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law, are in its branch offices located in one or more of the Southern Region states.

(10) "North Carolina Savings and Loan Holding Company" means a savings and loan holding company that:

a. Has its principal place of business in the State of North Carolina;

b. Has total deposits of its Southern Region association subsidiaries and North Carolina association subsidiaries that exceed eighty percent (80%) of the total deposits of all association subsidiaries of the savings and loan holding company other than those association subsidiaries held pursuant to Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law.

(11) "Principal place of business" of an association means the state in which the aggregate deposits of the association are the largest. For the purposes of this Article, the principal place of business of a savings and loan holding company is the state where the aggregate deposits of the association subsidiaries of the holding company are the largest.

(12) "Savings and loan holding company" means any company which directly or indirectly controls an association or controls any other company which is a savings and loan holding company.

(13) "Service Corporation" means any corporation, the majority of the capital stock of which is owned by one or more associations and which engages, directly or indirectly, in any activities which may be engaged in by a service corporation in which an association may invest under the laws of one of the states or under the laws of the United States.

(14) "Southern Region association" means an association other than a North Carolina association organized under the laws of one of the Southern Region states or under the laws of the United States and that:

a. Has its principal place of business only in a Southern Region state other than North Carolina;

b. Which if controlled by an organization, the organization is either a Southern Region association or a Southern Region savings and loan holding company; and

c. More than eighty percent (80%) of its total deposits, other than deposits located in branch offices acquired pursuant to Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law, are in its branch offices located in one or more of the Southern Region states.

(15) "Southern Region savings and loan holding company" means a savings and loan holding company that:
a. Has its principal place of business in a Southern Region state other than the State of North Carolina;
b. Has total deposits of its Southern Region association subsidiaries and North Carolina association subsidiaries that exceed eighty percent (80%) of the total deposits of all association subsidiaries of the savings and loan holding company other than those association subsidiaries held pursuant to Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law.

(16) "Southern Region states" means the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia.

(17) "State" means any state of the United States and the District of Columbia.

(18) "State association" means an association organized under the laws of one of the states.

(19) "Subsidiary" means that which is set forth in the Federal Savings and Loan Holding Company Act, 12 U.S.C. Section 1730a(a)(1)(H), as amended. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§ 54B-48.3. (For effective date see note) Acquisitions by Southern Region savings and loan holding companies and Southern Region associations.

(a) A Southern Region savings and loan holding company or a Southern Region association that does not have a North Carolina association subsidiary (other than a North Carolina association subsidiary that was acquired either pursuant to Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)), or comparable provisions in state law, or in the regular course of securing or collecting a debt previously contracted in good faith) may acquire a North Carolina savings and loan holding company or a North Carolina association with the approval of the Administrator. The Southern Region savings and loan holding company or Southern Region association shall submit to the Administrator an application for approval of such acquisition, which application shall be approved only if:

(1) The Administrator determines that the laws of the state in which the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business permit North Carolina savings and loan holding companies and North Carolina associations to acquire associations and savings and loan holding companies in that state;

(2) The Administrator determines that the laws of the state in which the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business permit such Southern Region savings and loan holding

company or Southern Region association to be acquired by the North Carolina savings and loan holding company or North Carolina association sought to be acquired;

(3) The Administrator determines either that the North Carolina association sought to be acquired has been in existence and continuously operating for more than five years or that all of the association subsidiaries of the North Carolina savings and loan holding company sought to be acquired have been in existence and continuously operating for more than five years: Provided, that the Administrator may approve the acquisition by a Southern Region savings and loan holding company or Southern Region association of all or substantially all of the shares of an association organized solely for the purpose of facilitating the acquisition of an association that has been in existence and continuously operating as an association for more than five years; and

(4) The Administrator makes the acquisition subject to any conditions, restrictions, requirements or other limitations that would apply to the acquisition by a North Carolina savings and loan holding company or North Carolina association of an association or savings and loan holding company in the state where the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business but that would not apply to the acquisition of an association or savings and loan holding company in such state by an association or a savings and loan holding company all the association subsidiaries of which are located in that state;

(5) With respect to acquisitions involving the merger or consolidation of two associations resulting in a Southern Region association, the application includes a business plan extending for an initial period of at least three years from the date of the acquisition which shall be renewed thereafter for as long as may be required by the Administrator. The association may not deviate without the prior written approval of the Administrator from the business plan which shall address such matters as the Administrator may deem appropriate for the protection of the depositors and members of the acquired North Carolina association and the general public. The business plan shall address, without limitation:

a. Insurance of depositors' accounts.
b. Limitation of services and activities to those permitted under this Chapter to North Carolina associations.
c. Conversion of corporate form or other fundamental changes.
d. Closing, selling or divesting any or all North Carolina branches.
e. Protection of the voting rights of North Carolina members.

(b) A Southern Region savings and loan holding company or Southern Region association that has a North Carolina association subsidiary (other than a North Carolina association subsidiary that was acquired either pursuant to Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)), or comparable provisions in North Carolina law, or in the regular course of securing or collecting a debt previously contracted in good faith) may acquire any North Carolina association or North Carolina savings and loan holding company with the approval of the Administrator. The Southern Region savings and loan holding company shall submit to the Administrator an application for approval of such acquisition, which application shall be approved only if:

(1) The Administrator determines either that the North Carolina association sought to be acquired has been in existence and continuously

operating for more than five years or that all of the association subsidiaries of the North Carolina savings and loan holding company sought to be acquired have been in existence and continuously operating for more than five years: Provided, that the Administrator may approve the acquisition by a Southern Region savings and loan holding company or Southern Region association of all or substantially all of the shares of an association organized solely for the purpose of facilitating the acquisition of an association that has been in existence and continuously operating as an association for more than five years; and

(2) The Administrator makes the acquisition subject to any conditions, restrictions, requirements or other limitations that would apply to the acquisition by the North Carolina savings and loan holding company or North Carolina association of an association or savings and loan holding company in the State where the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business but that would not apply to the acquisition of an association or savings and loan holding company in such state by a savings and loan holding company all the association subsidiaries of which are located in that state.

(3) With respect to acquisitions involving the merger or consolidation of two associations resulting in a Southern Region association, the application includes a business plan extending for an initial period of at least three years from the date of the acquisition which shall be renewed thereafter for as long as may be required by the Administrator. The association may not deviate without the prior written approval of the Administrator from the business plan which shall address such matters as the Administrator may deem appropriate for the protection of the depositors and members of the acquired North Carolina association and the general public. The business plan shall address, without limitation:

a. Insurance of depositors' accounts.
b. Limitation of services and activities to those permitted under this Chapter to North Carolina associations.
c. Conversion of corporate form or other fundamental changes.
d. Closing, selling or divesting any or all North Carolina branches.
e. Protection of the voting rights of North Carolina members.

(c) The Administrator shall rule on any application submitted under this section not later than 90 days following the date of submission of a complete application. If the Administrator fails to rule on the application within the requisite 90-day period, the failure to rule shall be deemed a final decision of the Administrator approving the application. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7 makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§ 54B-48.4. (For effective date see note) Exceptions.

A North Carolina savings and loan holding company, a North Carolina association, a Southern Region savings and loan holding company, or a Southern Region association may acquire or control, and shall not cease to be a North Carolina savings and loan holding company, a North Carolina association, a Southern Region savings and loan holding company, or a Southern Region association, as the case may be, by virtue of its acquisition or control of:

(1) An association having branch offices in a state not within the region, if such association has been acquired pursuant to the provisions of Section 123 of the Garn-St Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)), or comparable provisions of state law;

(2) An association which is not a Southern Region association if such association has been acquired in the regular course of securing or collecting a debt previously contracted in good faith, and if the association or savings and loan holding company divests the securities or assets acquired within two years of the date of acquisition. A North Carolina association, a North Carolina savings and loan holding company, or a Southern Region association may retain these interests for up to three additional periods of one year if the Administrator determines that the required divestiture would create undue financial difficulties for that association or savings and loan holding company. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§ 54B-48.5. (For effective date see note) Prohibitions.

(a) Except as may be expressly permitted by federal law, no savings and loan holding company that is not either a North Carolina savings and loan holding company or a Southern Region savings and loan holding company shall acquire a North Carolina savings and loan holding company or a North Carolina association.

(b) Except as required by federal law, a North Carolina savings and loan holding company or a Southern Region savings and loan holding company that ceases to be a North Carolina savings and loan holding company or a Southern Region savings and loan holding company shall as soon as practicable and, in all events, within one year after such event divest itself of control of all North Carolina savings and loan holding companies and all North Carolina associations: Provided, however, that such divestiture shall not be required if the North Carolina savings and loan holding company or the Southern Region savings and loan holding company ceases to be a North Carolina savings and loan holding company or a Southern Region savings and loan holding company, as the case may be, because of an increase in the deposits held by association subsidiaries not located within the region and if such increase is not the result of the acquisition of an association or savings and loan holding company. Provided further that nothing in this Article shall be construed to permit interstate branching by associations nor to require the divestiture of a North Carolina association or a North Carolina savings and loan holding company by a savings and loan holding company which acquired its subsidiary North Carolina association or North Carolina savings and loan holding company

prior to the effective date of this Article. Nor shall anything in this Article be construed to prohibit any savings and loan holding company which has acquired a North Carolina association or North Carolina savings and loan holding company prior to the effective date of this Article from acquiring additional North Carolina associations or North Carolina savings and loan holding companies. Nor shall anything in this Article be construed to limit the authority of the Administrator pursuant to G.S. 54B-44. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§ 54B-48.6. (For effective date see note) Applicable laws, rules and regulations.

(a) Any North Carolina association that is controlled by a savings and loan holding company that is not a North Caolina savings and loan holding company shall be subject to all laws of this State and all rules and regulations under such laws that are applicable to North Carolina associations that are controlled by North Carolina savings and loan holding companies.

(b) The Administrator may promulgate rules, including the imposition of a reasonable application and administration fee, to implement and effectuate the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§ 54B-48.7. (For effective date see note) Appeal of Administrator's decision.

Notwithstanding any other provision of law, any aggrieved party in a proceeding under G.S. 54B-48.3 or G.S. 54B-48.4(2) may, within 30 days after final decision of the Administrator and by written notice to the Administrator, appeal directly to the North Carolina Court of Appeals for judicial review on the record. In the event of an appeal, the Administrator shall certify the record to the Clerk of the Court of Appeals within 30 days after filing of the appeal. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§ 54B-48.8. (For effective date see note) Periodic reports; interstate agreements.

(a) The Administrator may from time to time require reports under oath in such scope and detail as he may reasonably determine of each Southern Region savings and loan holding company or Southern Region association subject to this Article for the purpose of assuring continuing compliance with the provisions of this Article.

(b) The Administrator may enter into cooperative agreements with other savings and loan regulatory authorities for the periodic examination of any Southern Region savings and loan holding company or Southern Region association that has a North Carolina association subsidiary and may accept reports of examination and other records from such authorities in lieu of conducting its own examinations. The Administrator may enter into joint actions with other savings and loan regulatory authorities having concurrent jurisdiction over any Southern Region savings and loan holding company or Southern Region association that has a North Carolina association subsidiary or may take such actions independently to carry out his responsibilities under this Chapter and assure compliance with the provisions of this Article and the applicable laws of this State. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§ 54B-48.9. (For effective date see note) Enforcement.

The Administrator shall have the power to enforce the provisions of this Article, including the divestiture requirement of G.S. 54B-48.5(b), through an action in any court of this State or any other state or in any court of the United States for the purpose of obtaining an appropriate remedy for violation of any provision of this Article, including such criminal penalties as are contemplated by G.S. 54B-66. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

§§ 54B-49 to 54B-51: Reserved for future codification purposes.

ARTICLE 11.

Foreign Associations.

§§ 54B-221 to 54B-235: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1087, s. 6, effective July 5, 1984.

Cross References. — For the North Carolina Regional Reciprocal Savings and Loan Acquisition Act, and the effective date thereof, see § 54B-48.1 et seq.

ARTICLE 13.

Savings and Loan Holding Companies.

§ 54B-261. (For effective date see note) Savings and loan holding companies.

(a) Notwithstanding any other provision of law, any stock association may reorganize its ownership, to provide for ownership by a savings and loan holding company, upon adoption of a plan of reorganization by a favorable vote of not less than two thirds of the members of the board of directors of the association and approval of such plan of reorganization by the holders of not less than a majority of the issued and outstanding shares of stock of the association. The plan of reorganization shall provide that (i) the resulting ownership shall be vested in a North Carolina corporation, (ii) all stockholders of the stock association shall have the right to exchange shares, (iii) the exchange of stock shall not be subject to State or federal income taxation, (iv) stockholders not wishing to exchange shares shall be entitled to dissenters' rights as provided under G.S. 55-113 and (v) the plan of reorganization is fair and equitable to all stockholders.

(b) Repealed by Session Laws 1983, c. 144, s. 8, effective April 6, 1983.

(c) A savings and loan holding company may invest in any investment authorized by its Board of Directors, except as limited by regulations promulgated by the Administrator pursuant to this Article.

(d) Any entity which controls a state stock association, or acquires control of a state stock association, is a savings and loan holding company. (1981, c. 282, s. 3; 1983, c. 144, s. 8; 1983 (Reg. Sess., 1984), c. 1087, ss. 4, 5.)

For this section as in effect until the amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1087, ss. 4 and 5, becomes effective, see the Replacement Volume and the 1983 Cumulative Supplement.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, makes ss. 1 through 5 effective on the earlier of: (1) The date on which registration becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment rewrote subsection (c) and added subsection (d). For the effective date of this amendment, see the Editor's Note.

Chapter 55.

Business Corporation Act.

Article 3.

Formation, Name and Registered Office.

§ 55-8. Corporate existence; filing of articles of incorporation; effect.

CASE NOTES

Applied in Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984).

§ 55-11. Organization meeting of directors.

CASE NOTES

Applied in Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984).

Article 4.

Powers and Management.

§ 55-22. Loans and guaranties.

CASE NOTES

Grant of Security Interest. — This section is not drafted or designed to prevent a corporation from granting a security interest in its own property to secure its own obligation to another party. Landscaping Servs., Inc. v. Poole, 38 Bankr. 21 (Bankr. E.D.N.C. 1983).

Restriction Imposed. — The language contained in this section is very broad and severely restricts the right of a corporation to lend money or property to, or guarantee or otherwise secure the obligation of a dominant shareholder, directors or officers of any corporation of which the officers and directors of the lending or securing corporation own more than 50% of the outstanding stock of any class; such a restriction is consistent with the fiduciary relationship created by § 55-35 between the corporation and directors of the corporation. Landscaping Servs., Inc. v. Poole, 38 Bankr. 21 (Bankr. E.D.N.C. 1983).

§ 55-30. Director's adverse interest.

CASE NOTES

For discussion of the "doctrine of corporate opportunity," see Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

Determination of what is "just and reasonable" and, thus, whether a corporate opportunity has indeed been usurped, is, of course, one in which no hard and fast rule can be formulated. Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

§ 55-32. Liability of directors in certain cases.

CASE NOTES

Quoted in Landscaping Servs., Inc. v. Poole, 38 Bankr. 21 (Bankr. E.D.N.C. 1983).

§ 55-35. Duty of directors and officers to corporation.

CASE NOTES

The language contained in § 55-22 is very broad and severely restricts the right of a corporation to lend money or property to, or guarantee or otherwise secure the obligation of a dominant shareholder, directors or officers of any corporation of which the officers and directors of the lending or securing corporation own more than 50% of the outstanding stock of any class; such a restriction is consistent with the fiduciary relationship created by this section between the corporation and directors of the corporation. Landscaping Servs., Inc. v. Poole, 38 Bankr. 21 (Bankr. E.D.N.C. 1983).

Duty owed, etc. —

In accord with 1983 Cum. Supp. See Umstead v. Durham Hosiery Mills, Inc., 578 F. Supp. 342 (M.D.N.C. 1984).

ARTICLE 5.

Corporate Finance.

§ 55-43. Subscriptions for shares.

CASE NOTES

Purpose of section. — The purpose of any statute of frauds type of provision is to prevent fraud by requiring certain important transactions to be evidenced by a writing. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984).

§ 55-46. Consideration for shares.

CASE NOTES

The word "rendered" indicates that the services must be performed prior to the issuance of the shares, so the requirement that the shares be taken for an agreed price has been satisfied by previous years of work in the business. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984).

Article 6.

Shareholders.

§ 55-53. Liability of shareholders arising from acquisition of shares.

CASE NOTES

Cited in Glenn v. Wagner, — N.C. App. —, 313 S.E.2d 832 (1984).

§ 55-55. Shareholders' derivative actions.

CASE NOTES

Applied in Miller v. Ruth's of N.C., Inc., — N.C. App. —, 313 S.E.2d 849 (1984).

§ 55-73. Shareholders' agreements.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984).

Article 8.

Fundamental Changes.

§ 55-110. Effect of merger or consolidation.

CASE NOTES

Quoted in Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., — N.C. App. —, 314 S.E.2d 801 (1984).

§ 55-113. Rights of objecting shareholders upon fundamental changes and certain exchanges of shares.

CASE NOTES

Applied in Umstead v. Durham Hosiery Mills, Inc., 578 F. Supp. 342 (M.D.N.C. 1984).

ARTICLE 9.

Dissolution and Liquidation.

§ 55-125. Power of courts to liquidate and decree involuntary dissolution.

CASE NOTES

Discretion in Grant of Relief. — When a shareholder brings suit seeking relief under subdivision (a)(4) of this section and § 55-125.1, he has the burden of proving that his "rights or interests" as a shareholder are being contravened. However, once the shareholder has established this, the trial court, in deciding whether to grant relief, must exercise its equitable discretion, and consider the actual benefit and injury to all of the shareholders resulting from dissolution or other possible relief. To hold otherwise would allow a plaintiff to demand at will dissolution of a corporation or a forced buy out of his shares or other relief at the expense of the corporation and without regard to the rights and interests of the other shareholders. Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

For analysis a trial court is to apply in resolving suits brought under subdivision (a)(4) of this section and § 55-125.1, see Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

Cited in Miller v. Ruth's of N.C., Inc., — N.C. App. —, 313 S.E.2d 849 (1984).

§ 55-125.1. Discretion of court to grant relief other than dissolution.

CASE NOTES

Discretion in Grant of Relief. — When a shareholder brings suit seeking relief under § 55-125(a)(4) and this section, he has the burden of proving that his "rights or interests" as a shareholder are being contravened. However, once the shareholder has established this, the trial court, in deciding whether to grant relief, must exercise its equitable discretion, and consider the actual benefit and injury to all of the shareholders resulting from dissolution or other possible relief. To hold otherwise would allow a plaintiff to demand at will dissolution of a corporation or a forced buy out of his shares or other relief at the expense of the corporation and without regard to the rights and interests of the other shareholders. Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

For analysis a trial court is to apply in resolving suits brought under § 55-125(a)(4) and this section, see Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

Cited in Miller v. Ruth's of N.C., Inc., — N.C. App. —, 313 S.E.2d 849 (1984).

§ 55-127. Procedure in liquidation of corporation by court.

CASE NOTES

Cited in Miller v. Ruth's of N.C., Inc., — N.C. App. —, 313 S.E.2d 849 (1984).

ARTICLE 10.

Foreign Corporations.

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983).

Chapter 55A.

Nonprofit Corporation Act.

Article 1.

General Provisions.

§ 55A-1. Title.

CASE NOTES

Cited in Winfas, Inc. v. Region P Human Dev. Agency, 64 N.C. App. 724, 308 S.E.2d 99 (1983).

Article 11.

Curative Provisions.

§ 55A-89.1. Validation of amendments to corporate charters extending corporate existence; limitation of actions; intent.

CASE NOTES

Cited in Winfas, Inc. v. Region P Human Dev. Agency, 64 N.C. App. 724, 308 S.E.2d 99 (1983).

Chapter 55B.

Professional Corporation Act.

§ 55B-1. Title.

CASE NOTES

Cited in Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

§ 55B-4. Formation of corporation.

CASE NOTES

Stated in Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

§ 55B-5. Corporate name.

CASE NOTES

Stated in Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983).

Chapter 57.

Hospital, Medical and Dental Service Corporations.

Article 1.

In General.

Sec.
57-7.3. Coverage for chemical dependency treatment.

ARTICLE 1.

In General.

§ 57-7.3. Coverage for chemical dependency treatment.

(a) As used in this section, the term "chemical dependency" means the pathological use or abuse of alcohol or other drugs in a manner or to a degree that produces an impairment in personal, social, or occupational functioning and which may, but need not, include a pattern of tolerance and withdrawal.

(b) Every group insurance certificate or group subscriber contract under any hospital or medical plan governed by this Chapter that is issued, renewed, or amended on or after January 1, 1985, shall offer to its insureds benefits for the necessary care and treatment of chemical dependency that are not less favorable than benefits for physical illness generally. Except as provided in subsection (c) of this section, benefits for chemical dependency shall be subject to the same durational limits, dollar limits, deductibles, and coinsurance factors as are benefits for physical illness generally.

(c) Every group insurance certificate or group subscriber contract that provides benefits for chemical dependency treatment and that provides total annual benefits for all illnesses in excess of six thousand dollars ($6,000) is subject to the following conditions:

(1) The certificate or contract shall provide, for each 24-month period, a minimum benefit of six thousand dollars ($6,000) for the necessary care and treatment of chemical dependency.

(2) No more than one half of the certificate's or contract's maximum benefits for chemical dependency for a 24-month period shall be paid for the necessary care and treatment of chemical dependency in any 30 consecutive day period.

(3) The certificate or contract shall provide a minimum benefit of twelve thousand dollars ($12,000) for the necessary care and treatment of chemical dependency for the life of the certificate or contract.

(d) Provisions for benefits for necessary care and treatment of chemical dependency in group certificates or group contracts shall provide for benefit payments for the following providers of necessary care and treatment of chemical dependency:

(1) The following units of a general hospital licensed under Article 5 of General Statutes Chapter 131E:

a. Chemical dependency units in facilities licensed after October 1, 1984;

b. Medical units;

c. Psychiatric units; and

(2) The following facilities or programs licensed after July 1, 1984, under Article 1A of General Statutes Chapter 122:
   a. Chemical dependency units in psychiatric hospitals;
   b. Chemical dependency hospitals;
   c. Residential chemical dependency treatment facilities;
   d. Social setting detoxification facilities or programs;
   e. Medical detoxification facilities or programs; and

(3) Duly licensed physicians and duly licensed practicing psychologists and certified professionals working under the direct supervision of such physicians or psychologists in facilities described in (1) and (2) above and in day/night programs or outpatient treatment facilities licensed after July 1, 1984, under Article 1A of General Statutes Chapter 122.

Provided, however, that nothing in this subsection shall prohibit any certificate or contract from requiring the most cost effective treatment setting to be utilized by the person undergoing necessary care and treatment for chemical dependency.

(e) Coverage for chemical dependency treatment as described in this section shall not be applicable to any group certificate holder or group subscriber contract holder who rejects the coverage in writing. (1983 (Reg. Sess., 1984), c. 1110, s. 8.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 17, makes this section effective upon ratification. The act was ratified July 6, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 14, provides:

"Each insurer and health maintenance organization that offers benefits for chemical dependency treatment shall report to the North Carolina Department of Insurance its experience under Sections 7, 8, or 9 of this act on or before April 1, 1986. The Department shall compile such reports and present them to the Mental Health Study Commission and to the Joint Legislative Commission on Governmental Operations on or before May 1, 1986. Such report shall contain the following information:

"(1) The number of policies written that include coverage for chemical dependency treatment.

"(2) The number of insureds and beneficiaries or enrollees covered for chemical dependency treatment and the number not covered.

"(3) The number of offerings of coverage made and the number rejected.

"(4) Recommendations regarding the offering of chemical dependency benefits."

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides:

"The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Chapter 57B.

Health Maintenance Organization Act.

Sec.

57B-12.1. Coverage for chemical dependency treatment.

§ 57B-12.1. Coverage for chemical dependency treatment.

(a) As used in this section, the term "chemical dependency" means the pathological use or abuse of alcohol or other drugs in a manner or to a degree that produces an impairment in personal, social or occupational functioning and which may, but need not, include a pattern of tolerance and withdrawal.

(b) On and after January 1, 1985, every health maintenance organization that writes a health care plan on a group basis and that is subject to this Chapter shall offer benefits for the necessary care and treatment of chemical dependency that are not less favorable than benefits under the health care plan generally. Except as provided in subsection (c) of this section, benefits for chemical dependency shall be subject to the same durational limits, dollar limits, deductibles, and coinsurance factors as are benefits under the health care plan generally.

(c) Every group health care plan that provides benefits for chemical dependency treatment and that provides total annual benefits for all illnesses in excess of six thousand dollars ($6,000) is subject to the following conditions:

(1) The plan shall provide, for each 24-month period, a minimum benefit of six thousand dollars ($6,000) for the necessary care and treatment of chemical dependency.

(2) No more than one half of the plan's maximum benefits for chemical dependency for a 24-month period shall be paid for the necessary care and treatment of chemical dependency in any 30 consecutive day period.

(3) The plan shall provide a lifetime minimum benefit of twelve thousand dollars ($12,000) for the necessary care and treatment of chemical dependency for each enrollee.

(d) Provisions for benefits for necessary care and treatment of chemical dependency in group health care plans shall provide for benefit payments for the following providers of necessary care and treatment of chemical dependency:

(1) The following units of a general hospital licensed under Article 5 of General Statutes Chapter 131E:
   a. Chemical dependency units in facilities licensed after October 1, 1984;
   b. Medical units;
   c. Psychiatric units; and

(2) The following facilities or programs licensed after July 1, 1984, under Article 1A of General Statutes Chapter 122:
   a. Chemical dependency units in psychiatric hospitals;
   b. Chemical dependency hospitals;
   c. Residential chemical dependency treatment facilities;
   d. Social setting detoxification facilities or programs;
   e. Medical detoxification facilities or programs; and

(3) Duly licensed physicians and duly licensed practicing psychologists and certified professionals working under the direct supervision of such physicians or psychologists in facilities described in (1) and (2) above and in day/night programs or outpatient treatment facilities

licensed after July 1, 1984, under Article 1A of General Statutes Chapter 122.

Provided, however, that nothing in this subsection shall prohibit any plan from requiring the most cost effective treatment setting to be utilized by the person undergoing necessary care and treatment for chemical dependency.

(e) Coverage for chemical dependency treatment as described in this section shall not be applicable to any group that rejects the coverage in writing.

(f) Notwithstanding any other provision of this section or Chapter, any health maintenance organization subject to this Chapter that becomes a qualified health maintenance organization under Title XIII of the United States Public Health Service Act shall provide the benefits required under that federal Act, which shall be deemed to constitute compliance with the provisions of this section; and any health maintenance organization may provide that the benefits provided under this section must be obtained through providers affiliated with the health maintenance organization. (1983 (Reg. Sess., 1984), c. 1110, s. 9.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 17, makes this section effective upon ratification. The act was ratified July 6, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 14, provides:

"Each insurer and health maintenance organization that offers benefits for chemical dependency treatment shall report to the North Carolina Department of Insurance its experience under Sections 7, 8, or 9 of this act on or before April 1, 1986. The Department shall compile such reports and present them to the Mental Health Study Commission and to the Joint Legislative Commission on Governmental Operations on or before May 1, 1986. Such report shall contain the following information:

"(1) The number of policies written that include coverage for chemical dependency treatment.

"(2) The number of insureds and beneficiaries or enrollees covered for chemical dependency treatment and the number not covered.

"(3) The number of offerings of coverage made and the number rejected.

"(4) Recommendations regarding the offering of chemical dependency benefits."

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides:

"The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Chapter 58.

Insurance.

SUBCHAPTER I. INSURANCE DEPARTMENT.

Article 2.

Commissioner of Insurance.

Sec.

58-6. (Effective July 1, 1985) Salary of Commissioner of Insurance.

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

Article 26.

Nature of Policies.

58-251.1 Accident and health policy provisions.

Sec.

58-251.8. Coverage for chemical dependency treatment.

SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 1.

Title and Definitions.

§ 58-3. Contract of insurance.

CASE NOTES

Stated in Kraemer v. Moore, — N.C. App. —, 313 S.E.2d 610 (1984).

ARTICLE 2.

Commissioner of Insurance.

§ 58-6. (Effective July 1, 1985) Salary of Commissioner of Insurance.

The salary of the Commissioner of Insurance shall be set by the General Assembly in the Current Operations Appropriations Act. (1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; c. 771, s. 3; Rev., s. 2756; 1907, c. 830, s. 10; c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; C.S., s. 3874; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342; 1945, c. 383; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 6; 1967, c. 1130; c. 1237, s. 6; 1969, c. 1214, s. 6; 1971, c. 912, s. 6; 1973, c. 778, s. 6; 1975, 2nd Sess., c. 983, s. 21; 1977, c. 802, s. 42.12; 1983, c. 761, s. 206; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 3.

General Regulations for Insurance.

§ 58-30. Statements in application not warranties.

CASE NOTES

I. IN GENERAL.

What Representations Are Material. — A representation in an application for insurance that influences the insurance company to accept the risk and enter into the contract is a material representation. Whether such representations are material depends upon the circumstances in each case and is usually, though not always, a question of fact for the jury. Michael v. St. Paul Fire & Marine Ins. Co., 65 N.C. App. 50, 308 S.E.2d 727 (1983).

Policy Avoided by False, etc. — In accord with 5th paragraph in original. See Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983).

Article 3C.

Unauthorized Insurers.

§ 58-54.20. Purpose of Article.

CASE NOTES

The purpose of §§ 58-54.20 through 58-54.23 is to protect unwary North Carolinians against the overreaching machinations and solicitations of unauthorized out-of-state insurers in selling insurance policies; certainly, their purpose is not to immunize from liability indemnitors who travel to other states and induce foreign sureties to bond fledgling North Carolina building contractors that have no credit of their own and that require bonds to stay in business. Henry Angelo & Sons v. Property Dev. Corp., 63 N.C. App. 569, 306 S.E.2d 162 (1983).

§ 58-54.21. Transacting business without certificate of authority prohibited; exceptions.

CASE NOTES

The purpose of §§ 58-54.20 through 58-54.23 is to protect unwary North Carolinians against the overreaching machinations and solicitations of unauthorized out-of-state insurers in selling insurance policies; certainly, their purpose is not to immunize from liability indemnitors who travel to other states and induce foreign sureties to bond fledgling North Carolina building contractors that have no credit of their own and that require bonds to stay in business. Henry Angelo & Sons v. Property Dev. Corp., 63 N.C. App. 569, 306 S.E.2d 162 (1983).

§ 58-54.22. Acts or transactions deemed to constitute transacting insurance business in this State.

CASE NOTES

The purpose of §§ 58-54.20 through 58-54.23 is to protect unwary North Carolinians against the overreaching machinations and solicitations of unauthorized out-of-state insurers in selling insurance policies; certainly, their purpose is not to immunize from liability indemnitors who travel to other states and induce foreign sureties to bond fledgling North Carolina building contractors that have no credit of their own and that require bonds to stay in business. Henry Angelo & Sons v. Property Dev. Corp., 63 N.C. App. 569, 306 S.E.2d 162 (1983).

§ 58-54.23. Validity of acts or contracts of unauthorized company shall not impair obligation of contract as to the company; maintenance of suits; right to defend.

CASE NOTES

The purpose of §§ 58-54.20 through 58-54.23 is to protect unwary North Carolinians against the overreaching machinations and solicitations of unauthorized out-of-state insurers in selling insurance policies; certainly, their purpose is not to immunize from liability indemnitors who travel to other states and induce foreign sureties to bond fledgling North Carolina building contractors that have no credit of their own and that require bonds to stay in business. Henry Angelo & Sons v. Property Dev. Corp., 63 N.C. App. 569, 306 S.E.2d 162 (1983).

The phrase "action at law or in equity,"cannot be interpreted to prevent cross-claims among defendants sued by others. Henry Angelo & Sons v. Property Dev. Corp., 63 N.C. App. 569, 306 S.E.2d 162 (1983).

This section deprives unauthorized insurers only of the right "to maintain an action at law or in equity" in regard to their prohibited business, it says nothing at all about maintaining cross-claims against codefendants. Henry Angelo & Sons v. Property Dev. Corp., 63 N.C. App. 569, 306 S.E.2d 162 (1983).

This section will not be extended beyond its express terms. Henry Angelo & Sons v. Property Dev. Corp., 63 N.C. App. 569, 306 S.E.2d 162 (1983).

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 13C.

Regulation of Insurance Rates.

§ 58-131.37. Rate standards.

CASE NOTES

Stated in Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984).

ARTICLE 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.10. Uniform Insurers Liquidation Act; definitions.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.12. Conduct of delinquency proceedings against insurers not domiciled in this State.

CASE NOTES

Creditors in nondomiciliary states are at liberty to prefer themselves by commencing attachment or similar proceedings against such property as may be found in their respective states. This, of course, results in inequity as to other creditors. North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

Wasteful conflicts are likely to arise between the domiciliary and the ancillary receivers during the administration of the assets since each receiver feels bound to seize as much of the company's property as possible in order that he may protect local creditors to the greatest possible extent. By requiring consolidation of general assets with the domiciliary receiver, while allowing local general creditors to prove their claims locally, the Uniform Act resolves problems both of unfair preferences for local creditors and of unnecessary hardship to them in participating in the domiciliary proceedings. North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.14. Claims against foreign insurers.

CASE NOTES

Creditors in nondomiciliary states are at liberty to prefer themselves by commencing attachment or similar proceedings against such property as may be found in their respective states. This, of course, results in inequity as to other creditors. North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

Wasteful conflicts are likely to arise between the domiciliary and the ancillary receivers during the administration of the assets since each receiver feels bound to seize as much of the company's property as possible in order that he may protect local creditors to the greatest possible extent. By requiring consolidation of general assets with the domiciliary receiver, while allowing local general creditors to prove their claims locally, the Uniform Act resolves problems both of unfair preferences for local creditors and of unnecessary hardship to them in participating in the domiciliary proceedings. North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.17. Uniformity of interpretation.

CASE NOTES

Applied in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.25. Date rights fixed on liquidation.

CASE NOTES

This section must be read in conjunction with § 58-155.60. North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

ARTICLE 17B.

Postassessment Insurance Guaranty Association.

§ 58-155.42. Purpose of Article.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.46. Creation of the Association.

CASE NOTES

Applied in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.48. Powers and duties of the Association.

CASE NOTES

The Legislature intended that the equivalent of the association have a direct right to facility proceeds. North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.51. Effect of paid claims.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-155.60. Use of deposits made by insolvent insurer.

CASE NOTES

This section must be read in conjunction with § 58-155.25. North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

SUBCHAPTER III. FIRE INSURANCE

ARTICLE 19.

Fire Insurance Policies.

§ 58-176. Fire insurance contract; standard policy provisions.

CASE NOTES

I. IN GENERAL.

Legislative Intent. — The legislature did not intend that a claimant on a fire insurance policy should be denied coverage if he or she executes the proof of loss before a notary without raising his or her hand and swearing to the truth of the statements in the proof of loss. Thompson v. Home Ins. Co., 62 N.C. App. 562, 303 S.E.2d 209, cert. denied, 309 N.C. 324, 307 S.E.2d 169 (1983).

Statutory standard fire insurance policy is incorporated into every policy of fire insurance issued in North Carolina. Star Varifoam Corp. of Am. v. Buffalo Reinsurance Co., 64 N.C. App. 306, 307 S.E.2d 194 (1983), cert. denied, 310 N.C. 154, 311 S.E.2d 294 (1984).

A misrepresentation by an insured constitutes a breach of cooperation clause only when the misrepresentation results in some actual detriment to the insured. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 313 S.E.2d 803 (1984).

A misrepresentation during a loss investigation is material within the meaning of subsection (c) of this section only when the misrepresentation prejudices the insurer. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 313 S.E.2d 803 (1984).

§ 58-177. Standard policy; permissible variations.

CASE NOTES

Legislative Intent. — The wording of the statute is unambiguous, reflecting a clear legislative intent that binders and contracts for temporary insurance be enforceable for only 60 days. Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 62 N.C. App. 419, 303 S.E.2d 332, cert. denied, 309 N.C. 461, 307 S.E.2d 364, 365 (1983).

Binders are void beyond the 60-day statutory period. Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 62 N.C. App. 419, 303 S.E.2d 332, cert. denied, 309 N.C. 461, 307 S.E.2d 364, 365 (1983).

Article 20.

Deposits and Bonds by Insurance Companies.

§ 58-182.1. Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-182.6. Securities held by Treasurer; faith of State pledged therefor; nontaxable.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-184. Sale of deposits for payment of liabilities.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-185. Lien of policyholders; action to enforce.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-188. Deposit required before license granted; exception.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

SUBCHAPTER IV. LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-197. Soliciting agent represents the company.

CASE NOTES

Legislative Intent. — This section was enacted by the General Assembly as a protective measure for consumers of insurance services. Its import is obviously to expand the class of persons capable of binding insurers to enforceable insurance obligations, and to prevent insurers who obtain consideration from persons solicited on their behalf, from relying on the purportedly ultra vires actions of their agents to deny liability to beneficiaries. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 63 N.C. App. 424, 305 S.E.2d 568 (1983).

This section establishes a conclusive presumption of an agency relationship once "solicitation" on the part of the agent is found. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 63 N.C. App. 424, 305 S.E.2d 568 (1983).

"Solicit" defined. — The word "solicit" is not defined in § 58-2; nor does the term appear to have been authoritatively construed in the reported decisions of the appellate courts of this State. Its meaning must be discerned, therefore, by application of fundamental principles of statutory construction. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 63 N.C. App. 424, 305 S.E.2d 568 (1983).

Responsibility of Insured, etc. —

When the agent of the insurance company answers questions for the applicant on an application for insurance, without the applicant having reason to know what answers the agent is supplying, the insurance company will be equitably estopped to rely on the falsity or inaccuracy supplied by its own agent in any effort to defeat liability on the policy. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 63 N.C. App. 424, 305 S.E.2d 568 (1983).

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-248.26. Definitions.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-248.27. North Carolina Motor Vehicle Reinsurance Facility; creation; membership.

CASE NOTES

Applied in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-248.28. Obligations after termination of membership.

CASE NOTES

Applied in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-248.29. Insolvency.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

§ 58-248.33. The Facility; functions; administration.

CASE NOTES

Stated in North Carolina Reinsurance Facility v. North Carolina Ins. Guar. Ass'n, — N.C. App. —, 313 S.E.2d 253 (1984).

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-251.1. Accident and health policy provisions.

(b) Other Provisions. — Except as provided in subsection (c) of this section, no such policy delivered or issued for delivery to any person in this State shall contain provisions respecting the matters set forth below unless such provisions are in the substance of the words that appear in this section. Any such provision contained in the policy shall be preceded individually by the appropriate caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision in the substance of the following language:

CHANGE OF OCCUPATION: If the insured be injured or contract sickness after having changed his occupation to one classified by the insurer as more hazardous than that stated in this policy or while doing for compensation anything pertaining to an occupation so classified, the insurer will pay only such portion of the indemnities provided in this policy as the premium paid would have purchased at the rates and within the limits fixed by the insurer for such more hazardous occupation. If the insured changes his occupation to one classified by the insurer as less hazardous than that stated in this policy, the insurer, upon receipt of proof of such change of occupation, will reduce the premium rate accordingly, and will return the excess pro rata unearned premium from the date of change of occupation or from the policy anniversary date immediately preceding receipt of such proof, whichever is the more recent. In applying this provision, the classification of occupational risk and the premium rates shall be such as have been last filed by the insurer prior to the occurrence of the loss for which the insurer is liable or prior to date of proof of change in occupation with the state official having supervision of insurance in the state where the insured resided at the time this policy was issued; but if such filing was not required, then the classification of occupational risk and the premium rates shall be those last made effective by the insurer in such state prior to the occurrence of the loss or prior to the date of proof of change in occupation.

(2) A provision in the substance of the following language:

MISSTATEMENT OF AGE: If the age of the insured has been misstated, all amounts payable under this policy shall be such as the premium paid would have purchased at the correct age.

(3) A provision in the substance of the following language:

OTHER INSURANCE IN THIS INSURER: If an accident or health or accident and health policy or policies previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for .... (insert type of coverage or coverages) in excess of $..... (insert maximum limit of indemnity or indemnities) the excess insurance shall be void and all premiums paid for such excess shall be returned to the insured or to his estate.

Or, in lieu thereof:

Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies.

(4) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis,

the "like amount" of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage.

(If the foregoing policy provision is included in a policy which also contains the next following policy provision there shall be added to the caption of the foregoing provision the phrase "... EXPENSE INCURRED BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and by hospital or medical service organizations, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, automobile medical payments insurance, or coverage provided by hospital or medical service organizations or by union welfare plans or employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provisions no third-party liability coverage shall be included as "other valid coverage.")

(5) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for such benefits under this policy shall be for such proportion of the indemnities otherwise provided hereunder for such loss as the like indemnities of which the insurer had notice (including the indemnities under this policy) bear to the total amount of all like indmenities for such loss, and for the return of such portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined.

(If the foregoing policy provision is included in a policy which also contains the next preceding policy provision there shall be added to the caption of the foregoing provision the phrase "... OTHER BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the

insurer has had notice. In applying the foregoing policy provision no third-party liability coverage shall be included as "other valid coverage.")

(6) A provision in the substance of the following language:

RELATION OF EARNINGS TO INSURANCE: If the total monthly amount of loss of time benefits promised for the same loss under all valid loss of time coverage upon the insured, whether payable on a weekly or monthly basis, shall exceed the monthly earnings of the insured at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability for which claim is made, whichever is the greater, the insurer will be liable only for such proportionate amount of such benefits under this policy as the amount of such monthly earnings or such average monthly earnings of the insured bears to the total amount of monthly benefits for the same loss under all such coverage upon the insured at the time such disability commences and for the return of such part of the premiums paid during such two years as shall exceed the pro rata amount of the premiums for the benefits actually paid hereunder; but this shall not operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of two hundred dollars ($200.00) or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time.

(The foregoing policy provision may be inserted only in a policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.

The insurer may, at its option, include in this provision a definition of "valid loss of time coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by governmental agencies or by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, or to any other coverage the inclusion of which may be approved by the Commissioner or any combination of such coverages. In the absence of such definition such term shall not include any coverage provided for such insured pursuant to any compusulory benefit statute (including any workmen's compensation or employer's liability statute), or benefits provided by union welfare plans or by employer or employee benefit organizations.)

(7) A provision in the substance of the following language:

UNPAID PREMIUM: Upon the payment of a claim under this policy, any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

(8) Repealed by Session Laws 1955, ch. 886, s. 1.

(9) A provision in the substance of the following language:

CONFORMITY WITH STATE STATUTES: Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

(10) A provision in the substance of the following language:

ILLEGAL OCCUPATION: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation.

(11) A provision in the substance of the following language:

INTOXICANTS AND NARCOTICS: Except for the payment of benefits for the necessary care and treatment of chemical dependency as required by law, the insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician.

(1953, c. 1095, s. 2; 1955, c. 850, s. 8; c. 886, s. 1; 1961, c. 432; 1979, c. 755, ss. 9 — 12; 1983 (Reg. Sess., 1984), c. 1110, s. 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides:

"The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, inserted "Except for the payment of benefits for the necessary care and treatment of chemical dependency as required by law" in subdivision (b)(11).

CASE NOTES

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 58-251.2. Renewability of individual and blanket hospitalization and accident and health insurance policies.

CASE NOTES

Constitutionality. — See American Nat'l Ins. Co. v. Ingram, 63 N.C. App. 38, 303 S.E.2d 649, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983).

Purpose of Section. — This act was designed to curb the abuse, at that time, of companies collecting premiums, then mass canceling of policies. In order to prevent companies from being locked in on inadequate rates, however, the General Assembly provided a method whereby the company, after giving the proper notice of nonrenewal, could seek a rate increase. American Nat'l Ins. Co. v. Ingram, 63 N.C. App. 38, 303 S.E.2d 649, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983).

§ 58-251.5. Insurers and others to afford coverage to mentally retarded and physically handicapped children.

CASE NOTES

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 58-251.6. Insurers and others to afford coverage for active medical treatment in tax-supported institutions.

CASE NOTES

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 58-251.8. Coverage for chemical dependency treatment.

(a) As used in this section, the term "chemical dependency" means the pathological use or abuse of alcohol or other drugs in a manner or to a degree that produces an impairment in personal, social or occupational functioning and which may, but need not, include a pattern of tolerance and withdrawal.

(b) Every insurer that writes a policy or contract of group or blanket health insurance or group or blanket accident and health insurance that is issued, renewed, or amended on or after January 1, 1985, shall offer to its insureds benefits for the necessary care and treatment of chemical dependency that are not less favorable than benefits for physical illness generally. Except as provided in subsection (c) of this section, benefits for treatment of chemical dependency shall be subject to the same durational limits, dollar limits, deductibles, and coinsurance factors as are benefits for physical illness generally.

(c) Every group policy or group contract of insurance that provides benefits for chemical dependency treatment and that provides total annual benefits for all illnesses in excess of six thousand dollars ($6,000) is subject to the following conditions:

(1) The policy or contract shall provide, for each 24-month period, a minimum benefit of six thousand dollars ($6,000) for the necessary care and treatment of chemical dependency.

(2) No more than one half of the policy's or contract's maximum benefits for chemical dependency for a 24-month period shall be paid for the necessary care and treatment of chemical dependency in any 30 consecutive day period.

(3) The policy or contract shall provide a minimum benefit of twelve thousand dollars ($12,000) for the necessary care and treatment of chemical dependency for the life of the policy or contract.

(d) Provisions for benefits for necessary care and treatment of chemical dependency in group policies or group contracts of insurance shall provide benefit payments for the following providers of necessary care and treatment of chemical dependency:

(1) The following units of a general hospital licensed under Article 5 of General Statutes Chapter 131E:
   a. Chemical dependency units in facilities licensed after October 1, 1984;
   b. Medical units;
   c. Psychiatric units; and

(2) The following facilities or programs licensed after July 1, 1984, under Article 1A of General Statutes Chapter 122:
   a. Chemical dependency units in psychiatric hospitals;
   b. Chemical dependency hospitals;
   c. Residential chemical dependency treatment facilities;

d. Social setting detoxification facilities or programs;
e. Medical detoxification facilities or programs; and

(3) Duly licensed physicians and duly licensed practicing psychologists and certified professionals working under the direct supervision of such physicians or psychologists in facilities described in (1) and (2) above and in day/night programs or outpatient treatment facilities licensed after July 1, 1984, under Article 1A of General Statutes Chapter 122.

Provided, however, that nothing in this subsection shall prohibit any policy or contract of insurance from requiring the most cost effective treatment setting to be utilized by the person undergoing necessary care and treatment for chemical dependency.

(e) Coverage for chemical dependency treatment as described in this section shall not be applicable to any group policy holder or group contract holder who rejects the coverage in writing. (1983 (Reg. Sess., 1984), c. 1110, s. 7.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 17, makes this section effective upon ratification. The act was ratified July 6, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 14, provides:

"Each insurer and health maintenance organization that offers benefits for chemical dependency treatment shall report to the North Carolina Department of Insurance its experience under Sections 7, 8, or 9 of this act on or before April 1, 1986. The Department shall compile such reports and present them to the Mental Health Study Commission and to the Joint Legislative Commission on Governmental Operations on or before May 1, 1986. Such report shall contain the following information:

"(1) The number of policies written that include coverage for chemical dependency treatment.

"(2) The number of insureds and beneficiaries or enrollees covered for chemical dependency treatment and the number not covered.

"(3) The number of offerings of coverage made and the number rejected.

"(4) Recommendations regarding the offering of chemical dependency benefits."

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides:

"The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

§ 58-254.1. Industrial sick benefit insurance defined.

CASE NOTES

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 58-254.2. Industrial sick benefit insurance; provisions.

CASE NOTES

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 58-254.4. Group accident and health insurance defined.

CASE NOTES

Applied in Stainback v. Investor's Consol. Ins. Co., 64 N.C. App. 197, 306 S.E.2d 532 (1983).

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

ARTICLE 27.

General Regulations.

§ 58-258. Conforming to statute.

CASE NOTES

Applied in Stainback v. Investor's Consol. Ins. Co., 64 N.C. App. 197, 306 S.E.2d 532 (1983).

ARTICLE 27B.

Medicare Supplement Insurance Minimum Standards.

§ 58-262.14. Standards for definitions in policies.

CASE NOTES

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 58-262.16. Minimum benefit standards.

CASE NOTES

Cited in Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Chapter 59.

Partnership.

Article 1.

Uniform Limited Partnership Act.

§ 59-2. Formation.

CASE NOTES

Applied in Johnson v. Manning, 63 N.C. App. 673, 306 S.E.2d 137 (1983).

Cited in Blow v. Shaughnessy, — N.C. App. —, 313 S.E.2d 868 (1984).

§ 59-11. Status of person erroneously believing himself a limited partner.

CASE NOTES

Cited in Blow v. Shaughnessy, — N.C. App. —, 313 S.E.2d 868 (1984).

§ 59-16. Withdrawal or reduction of limited partner's contribution.

CASE NOTES

Applied in Johnson v. Manning, 63 N.C. App. 673, 306 S.E.2d 137 (1983).

Article 2.

Uniform Partnership Act.

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.

CASE NOTES

Cited in Blow v. Shaughnessy, — N.C. App. —, 313 S.E.2d 868 (1984).

Chapter 61.

Religious Societies.

§ 61-3. Title to lands vested in trustees, or in societies.

CASE NOTES

Cited in African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983).

Chapter 62.

Public Utilities.

Article 1.

General Provisions.

Sec.

62-2. Declaration of policy.

Article 2.

Organization of Utilities Commission.

62-10. Number; appointment; terms; qualifications; chairman; vacancies; compensation; other employment prohibited.

Article 3.

Powers and Duties of Utilities Commission.

Sec.

62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

Article 6.

The Utility Franchise.

62-110. Certificate of convenience and necessity.

Article 1.

General Provisions.

§ 62-1. Short title.

CASE NOTES

Scope of Authority, etc. —

As to the jurisdiction of the utilities commission to require rail carrier to open drainage ditches along its tracks and to keep its drainage ditches open, see State ex rel. Utilities Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549, cert. denied and appeal dismissed, 309 N.C. 324, 307 S.E.2d 168 (1983).

§ 62-2. Declaration of policy.

Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a

manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plant under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development; and

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply.

To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of long distance services by public utilities defined in G.S. 62-3(23)a.6. and certified in accordance with the provisions of G.S. 62-110. (1963, c. 1165, s. 1; 1975, c. 877, s. 2; 1977, c. 691, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 1.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 29, 1984, added the last paragraph.

CASE NOTES

Applied in State ex rel. Utilities Comm'n v. Public Staff-North Carolina Util. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983).

§ 62-3. Definitions.

CASE NOTES

Subdivision (23)c Not Void for Vagueness. — A person of ordinary understanding would know from reading subdivision (23)c of this section that if a parent corporation controls its wholly owned public utility in such a way that the rates of the utility are affected this has an effect on the rates and the parent corporation could be found to be a public

utility. This prevents this section from being void for vagueness under the due process clause of U.S. Const., Amend. XIV. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

Nor Does It Contain Unconstitutional Delegation of Legislative Authority. — The General Assembly has given the Commission sufficient guidelines in subdivision (23)c of this section so that if the facts are properly found by the Commission, it does not make policy but carries out legislative policy. Therefore, subdivision (23)c does not delegate legislative authority in violation of N.C. Const., Art. I, § 6. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

ARTICLE 2.

Organization of Utilities Commission.

§ 62-10. Number; appointment; terms; qualifications; chairman; vacancies; compensation; other employment prohibited.

(h) The salary of each commissioner shall be the same as that fixed from time to time for judges of the superior court except that the commissioner designated as chairman shall receive one thousand dollars ($1,000) additional per annum. In lieu of merit and other increment raises paid to regular State employees, each commissioner, including the commissioner designated as chairman, shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as a member of the Utilities Commission.

(1941, c. 97, s. 2; 1949, c. 1009, s. 1; 1959, c. 1319; 1963, c. 1165, s. 1; 1967, c. 1238; 1975, c. 243, s. 3; c. 867, ss. 1, 2; 1977, c. 468, s. 1; c. 913, s. 2; 1983 (Reg. Sess., 1984), c. 1116, s. 91.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the last two sentences of subsection (h).

§ 62-15. Office of executive director; public staff, structure and function.

CASE NOTES

Applied in State ex rel. Utilities Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549 (1983).

Article 3.

Powers and Duties of Utilities Commission.

§ 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

(a) Whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:

(1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or

(2) That persons are not served who may reasonably be served, or

(3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or

(4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or

(5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,

the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order. This section shall not apply to terminal or terminal facilities of motor carriers of property.

(1933, c. 307, s. 10; 1949, c. 1029, s. 2; 1963, c. 1165, s. 1; 1965, c. 287, s. 6.)

Only Part of Section Set Out. — As the rest of the section is not affected, it is not set out.

Editor's Note. — Subsection (a) of this section is set out above to correct an error in punctuation and capitalization in the subsection as set out in the Replacement Volume.

CASE NOTES

Power and Duties, etc. —

As to the jurisdiction of the utilities commission to require rail carrier to open drainage ditches along its tracks and to keep its drainage ditches open, see State ex rel. Utilities Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549, cert. denied and appeal dismissed, 309 N.C. 324, 307 S.E.2d 168 (1983).

Article 4.

Procedure before the Commission.

§ 62-72. Commission may make rules of practice and procedure.

CASE NOTES

Power to Grant Continuance or Extend Hearing. — The Commission may regulate its own procedure within broad limits and that it may suspend or waive its rules. Thus, the commission has the power, within its discretion, to grant a continuance or extend a hearing. State ex rel. Utilities Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983), modified on other grounds, — N.C. App. —, 311 S.E.2d 617 (1984).

§ 62-79. Final orders and decisions; findings; service; compliance.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983).

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

CASE NOTES

Applied in State ex rel. Utilities Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549 (1983).

§ 62-94. Record on appeal; extent of review.

CASE NOTES

I. IN GENERAL.

Absence of proper findings is an error of law and basis for remand under subdivision (b)(4) of this section because it frustrates appellate review. State ex rel. Utilities Comm'n v. Conservation Council, — N.C. App. —, 311 S.E.2d 617 (1984).

Applied in State ex rel. Utilities Comm'n v. Public Staff-North Carolina Util. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983).

Cited in State ex rel. Utilities Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983).

ARTICLE 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity.

No public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business.

The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long distance services as a public utility as defined in G.S. 62-3(23)a.6., provided that such person is found to be fit,

capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately; provided further, that in such cases the Commission shall consider the impact on the local exchange customers and only permit such additional service if the Commission finds that it will not jeopardize reasonably affordable local exchange service. Notwithstanding any other provision of law, the terms, conditions, rates, and interconnections for long distance services offered on a competitive basis shall be regulated by the Commission in accordance with the public interest. In promulgating rules necessary to implement this provision, the Commission shall consider whether uniform or nonuniform application of such rules is consistent with the public interest. Provided further that the Commission shall consider whether the charges for the provision of interconnections should be uniform.

For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 2.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 29, 1984, added the last two paragraphs.

§ 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities.

CASE NOTES

The furnishing of electric service to an area subsequently annexed must be carried out pursuant to the 1965 Electric Act. State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

The 1965 Electric Act, §§ 160A-331 to 160A-338 and 62-110.1 to 62-110.2, does not empower or restrict municipalities in the operation of their electric systems outside their corporate limits. State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

§ 62-110.2. Electric service areas outside of municipalities.

CASE NOTES

Authority for Furnishing Service outside Corporate Limits. — The 1965 Electric Act, appearing in §§ 160A-331 through 160A-338 and this section, does not empower or authorize municipalities to operate electric systems outside corporate limits, nor does it restrict such service. Insofar as the General Statutes are concerned, the sole authority for, and the only restriction upon municipalities furnishing electric service outside corporate limits is found in § 160A-312. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983); State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

Applied in State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

Article 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

CASE NOTES

Cited in Aluminum Co. of Am. v. Utilities Comm'n, 713 F.2d 1024 (4th Cir. 1983).

§ 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

CASE NOTES

Notice of Possible Liability for Refund. — Where a corporation was held to be a public utility and made a party to a general rate case this was adequate notice that it might be held liable for a refund. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

§ 62-133. How rates fixed.

CASE NOTES

I. IN GENERAL.

Proceeding Is General Rate Case Where Question Is Fair Return on Investment. — The Commission was correct in conducting the proceeding as a general rate case, where the primary question was what is a fair rate of return on the utility's investment so as to enable it by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirement of its creditors. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

Requirement That Utility Prefile Testimony prior to That of Intervenors Is Constitutional. — A utility's due process rights were not violated by requiring it to prefile its testimony prior to the prefiling of the intervenors' testimony and requiring it to file its brief concurrently with the intervenors, where it should have been forewarned of what the intervenors intended to show. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

Applied in State ex rel. Utilities Comm'n v. North Carolina Textile Mfrs. Ass'n, 309 N.C. 238, 306 S.E.2d 113 (1983); State ex rel. Utilities Comm'n v. Public Staff-North Carolina Util. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983); State ex rel. Utilities Comm'n v. Public Staff-North Carolina Util. Comm'n, 64 N.C. App. 609, 307 S.E.2d 803 (1983).

III. FIXING OF RATES, GENERALLY.

Retroactive ratemaking occurs when a rate is set so as to permit collection in the future for expenses attributable to past services. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

It is not retroactive ratemaking for a corporation to be held responsible for a refund for the period prior to when it was declared a public utility. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

Charges Based on Utility's Percent of Requirements from Entire System. — By requiring a utility's retail customers to pay

demand and energy charges based on the utility's percent of the demand and energy requirements from the capacity of the entire system the Commission used a methodology which could not be disturbed on appeal. The methodology calculated the cost of the generation which the unified system traded to TVA for the electricity used by the system. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

Method Which Did Not Prefer State Customers over Foreign Customers Held Not to Violate Commerce Clause. — A provision in a Commission order that a "combined system's North Carolina public load has first call on the total electric energy output of the combined system, and to the extent that said output exceeds the requirements of the North Carolina public load, such excess will be available for sale and will be purchased by [the corporation of which the system was a wholly-owned subsidiary]" would violate the commerce clause. However, where the methodology used by the Commission allowed the combined system to recover the costs of the percentage of energy it used based on its percentage of the costs of the energy generated and purchased by the combined system, North Carolina customers would not be given a preference and no commerce clause violation would occur. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

IV. RATE BASE.

A. In General.

When Companies Considered as Single, Integrated System for Ratemaking. — Where two companies traded all their generation to TVA and received in exchange for this entitlements of energy which they divided as they pleased, the Commission could conclude from these facts that the two companies constitute a single, integrated system for ratemaking purposes. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

Subdivision (b)(1) is designed to make utility customers finance reasonable construction costs arising after July 1, 1979, regardless of whether that construction becomes useful to the customers. State ex rel. Utilities Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983), modified on other grounds, — N.C. —, 311 S.E.2d 617 (1984).

§ 62-133.2. Fuel charge adjustments for electric utilities.

CASE NOTES

Applied in State ex rel. Utilities Comm'n v. Public Staff-North Carolina Util. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983).

§ 62-134. Change of rates; notice; suspension and investigation.

CASE NOTES

I. IN GENERAL.

Cited in State ex rel. Utilities Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983); State ex rel. Utilities Comm'n v. Public Staff-North Carolina Util. Comm'n, 64 N.C. App. 609, 307 S.E.2d 803 (1983).

III. RATE CHANGES BASED ON FUEL COSTS UNDER FORMER SUBSECTION.

From a review of the language, purpose and history of former subsection (e), it can be concluded that the legislature intended that the Utilities Commission consider in the fuel adjustment proceedings only the fluctuations in the price of fossil fuels — oil, coal and natural gas — used by the utility in the production of electric power in its own generating units. The legislature did not intend to include in the expedited hearing proceedings the myriad of issues relating to purchased or interchange power which necessarily require closer scrutiny. Subsequent action by the legislature in enacting § 62-133.2, which makes express provision for

the consideration of such issues in the general rate cases, has now made its intent clear. State ex rel. Utilities Comm'n v. Public Staff-North Carolina Util. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983).

Article 11.

Railroads.

§ 62-235. Commission to inspect railroads as to equipment and facilities, and to require repair.

CASE NOTES

Inspection of Equipment and Facilities. — As to the jurisdiction of the Utilities Commission to require rail carrier to open drainage ditches along its tracks and to keep its drainage ditches open, see State ex rel. Utilities Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549, cert. denied and appeal dismissed, 309 N.C. 324, 307 S.E.2d 168 (1983).

Chapter 63.

Aeronautics.

Article 7.

State and Federal Aid; Authority of Department of Transportation.

Sec.
63-68. Limitations on State financial aid.
Sec.
63-71. Receipt of federal grants.
63-73. Letting of contracts for airport construction and repair.
63-74 to 63-77. [Reserved.]

Article 7.

State and Federal Aid; Authority of Department of Transportation.

§ 63-68. Limitations on State financial aid.

Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

(5) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to eighty percent (80%) of the nonfederal share of the total cost of the development of new or unpaved publicly owned airports identified in the North Carolina Airport System Plan, provided that such funding shall be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road. Electronic navigational aids, terminal buildings, access taxiways, and other items eligible for State airport aid at the rate of fifty percent (50%) of the nonfederal share of project cost shall not be eligible for the foregoing eighty percent (80%) State funding, even though constructed as part of the initial airport development. (1967, c. 1006, s. 1; 1969, c. 293; 1973, c. 1262, s. 28; c. 1443, s. 3; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39.2; 1979, c. 148, ss. 3, 5; c. 149; 1981, c. 1117, ss. 1, 2; 1983, c. 319; 1983 (Reg. Sess., 1984), c. 1094.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, rewrote subdivision (5).

§ 63-71. Receipt of federal grants.

(a) The Department of Transportation is hereby designated the State agency to accept grants for public airport development and improvements made by the United States pursuant to federal law. The Department shall have authority to comply with federal-aid provisions, to obtain and to disburse said grants in accordance with applicable federal laws and regulations, and to enter into contracts with the federal government, municipalities, counties, or airport authorities in connection with said grants. The Department shall also have the authority to enter into contracts with the Federal Aviation Administration or its successor agency for aeronautics related purposes, including joint acquisition and installation of aviation related equipment in accordance with the procurement procedures of the Federal Aviation Administration where such method of acquisition would result in a cost savings to the Department.

(1969, c. 1109, ss. 1, 2; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, ss. 4, 5; 1983 (Reg. Sess., 1984), c. 1093.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, added the language beginning "including joint acquisition and installation" at the end of the last sentence of subsection (a).

§ 63-73. Letting of contracts for airport construction and repair.

All contracts that the Department of Transportation may let for construction or repair or maintenance necessary to carry out the provisions of this Article shall be let in accordance with the provisions of G.S. 136-28.1. (1983 (Reg. Sess., 1984), c. 1033, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1033, s. 2, makes this section effective June 29, 1984.

§§ 63-74 to 63-77: Reserved for future codification purposes.

Chapter 66.

Commerce and Business.

Article 14.

Business under Assumed Name Regulated.

§ 66-71. Violation of Article a misdemeanor; civil penalty.

CASE NOTES

Applied in Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Article 24.

Trade Secrets Protection Act.

§ 66-152. Definitions.

CASE NOTES

Cited in Western Steer-Mom 'N' Pop's, Inc. v. FMT Invs., Inc. 578 F. Supp. 260 (W.D.N.C. 1984).

Article 25.

Regulation of Precious Metal Businesses.

§ 66-170. Items not to be modified.

OPINIONS OF ATTORNEY GENERAL

The five-day time period during which a precious metal dealer must hold purchased items before sale is calculated under § 1A-1, Rule 6(a), and the dealer may sell such items on the sixth day. See opinion of Attorney General to Mr. Robert F. Thomas, Jr., Police Attorney, Charlotte Police Department, 52 N.C.A.G. 74 (1983).

Chapter 69.

Fire Protection.

Article 3A.

Rural Fire Protection Districts.

§ 69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

Local Modification. — Town of Harrisburg: 1983 (Reg. Sess., 1984), c. 937.

Chapter 74C.

Private Protective Services.

Article 2.

Private Protective Services Recovery Fund.

Sec.

74C-31. Application for payment out of Fund; hearing grounds.

Article 2.

Private Protective Services Recovery Fund.

§ 74C-31. Application for payment out of Fund; hearing grounds.

(d) Until such time as the Fund reaches one hundred thousand dollars ($100,000), or at any time the Fund has insufficient assets in excess of one hundred thousand dollars ($100,000) to pay outstanding claims, the State Treasurer shall not disburse any payments to an aggrieved party. However, any party aggrieved and awarded payment as ordered by the Board which order is dated after July 1, 1983, shall hold a vested right for payment plus interest as provided in G.S. 24-1 once the Fund reaches a sufficient level for payments. Authorized payments which cannot be made due to the lack of funds will be paid as funds become available, beginning with those payments which have been unsatisfied for the longest period of time.

(1983, c. 673, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Subsection (d) of this section is set out to correct an error in the 1983 Cumulative Supplement.

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

Legal Periodicals. —
For survey of 1982 law on commercial law, see 61 N.C.L. Rev. 1018 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

The restraint is unreasonable and void if it is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted. Owing to the possibility that a person may be deprived of his livelihood, the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale. Starkings Court Reporting Servs., Inc. v. Collins, — N.C. App. —, 313 S.E.2d 614 (1984).

Applied in Williams v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 312 S.E.2d 905 (1984); Norlin Indus., Inc. v. Music Arts, Inc., — N.C. App. —, 313 S.E.2d 166 (1984).

Stated in Stearns v. Genrad, Inc., 564 F. Supp. 1309 (M.D.N.C. 1983); Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

Legal Periodicals. —
For survey of 1982 law on commercial law, see 61 N.C.L. Rev. 1018 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

This section is comparatively new and the North Carolina court has had only a limited opportunity to interpret it and to define its terms. American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

An action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used. To rule otherwise would produce the anomalous result of recognizing that although this section creates a cause of action broader than traditional common-law actions, § 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie. Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

An action for unfair or deceptive acts or practices is the creation of statute. It is, therefore, sui generis, and is neither wholly tortious nor wholly contractural in nature. Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

A practice is unfair, etc. —

Proof of conduct violative of the Sherman Act (15 U.S.C. § 1) is proof sufficient to establish a violation of the North Carolina Unfair Trade Practices Act. ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42 (4th Cir. 1983).

"In or Affecting Commerce". — Where in his answer defendant admitted that he was involved in business activities relating to the buying and selling of residential real estate,

there was sufficient evidence that defendant's conduct was "in or affecting commerce" so as to withstand a motion for a directed verdict. Wilder v. Squires, — N.C. App. —, 315 S.E.2d 63 (1984).

The remedies provided pursuant to this section are equitable in nature and should not be frustrated by narrow or strict applications of procedural rules. Moretz v. Northwestern Bank, — N.C. App. —, 313 S.E.2d 8 (1984).

Relation Between This Section and § 75-16. —

This section is an act for the protection of consumers and that § 75-16 was intended to create an effective private remedy for aggrieved consumers. American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

Coercive tactics are within the definition of unfair practices as used in this section. Wilder v. Squires, — N.C. App. —, 315 S.E.2d 63 (1984).

Duress or coercion may take the form of unlawfully inducing one to make a contract or to perform some other act against his own free will and it may be manifested by threats. Wilder v. Squires, — N.C. App.—, 315 S.E.2d 63 (1984).

A real estate broker and client have a measure of trust analogous to that of an attorney and his client; that the broker stands in a relation of trust and confidence. Starling v. Sproles, — N.C. App. —, 311 S.E.2d 688 (1984).

An agent employed to sell his principal's property may not himself become the purchaser absent both a good faith full disclosure to the principal of all material facts surrounding the transaction and consent by the principal after receiving full disclosure. Starling v. Sproles, — N.C. App. —, 311 S.E.2d 688 (1984).

A broker can neither purchase from nor sell to the principal unless the latter expressly consents thereto or with full knowledge of all the facts and circumstances agrees to the transaction. Starling v. Sproles, — N.C. App. —, 311 S.E.2d 688 (1984).

Real estate broker committed an unfair or deceptive act in violation of this section by failing to disclose prior to such broker's purchase of listed property that they had an offer to purchase the same property from a third party. Starling v. Sproles, — N.C. App. —, 311 S.E.2d 688 (1984).

An inequitable assertion of power or position may be an unfair act or practice. Libby Hill Seafood Restaurants, Inc. v. Owens, 62 N.C. App. 695, 303 S.E.2d 565, cert. denied, 309 N.C. 321, 307 S.E.2d 164 (1983).

Factors Determining Unfairness, etc. —

In accord with 1st paragraph in 1983 Cumulative Supplement. See Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

Intent and Good Faith Irrelevant. — If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant; good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public. Wilder v. Squires, — N.C. App. —, 315 S.E.2d 63 (1984).

The question of whether the defendant acted in bad faith is not pertinent. Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

Question of Law. — The determination of whether an act is unfair or deceptive is a question of law for the court. Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

Measure of Damages. — For discussion of measure of damages for fraudulent inducement, see Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

Applied in Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983).

Stated in Stearns v. Genrad, Inc., 564 F. Supp. 1309 (M.D.N.C. 1983).

Cited in Rose's Stores, Inc. v. Padgett, 62 N.C. App. 404, 303 S.E.2d 344 (1983); George v. Veach, — N.C. App. —, 313 S.E.2d 920 (1984); Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984); Day v. Coffey, — N.C. App. —, 315 S.E.2d 96 (1984).

II. SCOPE OF SECTION.

Automobile Sales. — A representation that a car is a demonstrator when it is, in fact, a used car may be inherently unfair to the average consumer, amd moreover, such a representation may tend to deceive the consumer. Lee v. Payton, — N.C. App. —, 313 S.E.2d 247 (1984).

Tortious interference with a contract could constitute an unfair method of competition or unfair acts within the meaning of the statute. American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

Debt collection activities were not within the purview of this section. American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

§ 75-4. Contracts to be in writing.

CASE NOTES

Legislative Intent. — Through this section, the General Assembly has declared that no contract whereby a person limits and restricts his legal right to do business in the State shall be valid and enforceable unless in writing and signed by the party so contracting. Norlin Indus., Inc. v. Music Arts, Inc., — N.C. App. —, 313 S.E.2d 166 (1984).

§ 75-5. Particular acts prohibited.

CASE NOTES

Applied in Norlin Indus., Inc. v. Music Arts, Inc., — N.C. App. —, 313 S.E.2d 166 (1984).

Stated in Stearns v. Genrad, Inc., 564 F. Supp. 1309 (M.D.N.C. 1983).

§ 75-16. Civil action by person injured; treble damages.

CASE NOTES

Legislative Intent. —

In accord with 1983 Cum. Supp. see American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

Measure of Damages. — An action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used. To rule otherwise would produce the anomalous result of recognizing that although § 75-1.1 creates a cause of action broader than traditional common-law actions, this section limits the availability of any remedy to cases where some recovery at common law would probably also lie. Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

For discussion of measure of damages for fraudulent inducement, see Bernard v. Central Carolina Truck Sales, Inc., — N.C. App. —, 314 S.E.2d 582 (1984).

Cited in ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42 (4th Cir. 1983); Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 315 S.E.2d 75 (1984); Day v. Coffey, — N.C. App. —, 315 S.E.2d 96 (1984).

§ 75-16.1. Attorney fee.

CASE NOTES

Applied in American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983); Wilder v. Squires, — N.C. App. —, 315 S.E.2d 63 (1984).

Cited in ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42 (4th Cir. 1983).

§ 75-16.2. Limitation of actions.

CASE NOTES

Applied in Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984); Norlin Indus., Inc. v. Music Arts, Inc., — N.C. App. —, 313 S.E.2d 166 (1984).

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

Sec.
75A-15. Regulations on water safety; adoption of the Uniform Waterway Marking System.

Article 2.

Local Water Safety Committees.

Sec.
75A-20 to 75A-25. [Repealed.]

Article 1.

Boating Safety Act.

§ 75A-15. Regulations on water safety; adoption of the Uniform Waterway Marking System.

(a) In accordance with subsection (b) of this section, the Wildlife Resources Commission is empowered to make special regulations, for the local water in question, as to:

(1) Operation of vessels, including restrictions concerning speed zones, and type of activity conducted.

(2) Promotion of boating and water safety generally by occupants of vessels, swimmers, fishermen, and others using the water.

(3) Placement and maintenance of navigation aids and markers, in conformity with governing provisions of law.

Prior to making any special regulations, the Commission shall investigate the water recreation and safety needs of the local water in question. In making such investigation, the Commission in its discretion may hold public hearings on the regulations proposed and the general needs of the local water in question. After such investigation and application of standards, the Commission may in its discretion pass the special regulations requested, pass them in an amended form, or refuse to pass them. After passage, the Commission may amend or repeal the special regulations after first holding a public hearing.

(b) Any subdivision of this State may, but only after public notice, make formal application to the Wildlife Resources Commission for special regulations on waters within the subdivision's territorial limits as to the matters listed in subsection (a) of this section. The Wildlife Resources Commission may, in accordance with applicable provisions of General Statutes Chapter 150A, adopt special regulations for local areas of water defined by the Commission that are found to be heavily used for water recreation purposes by persons from other areas of the State and as to which there is not coordinated local interest in regulation.

The Wildlife Resources Commission is authorized and empowered to adopt regulations as provided by Chapter 150A, Administrative Procedure Act, prohibiting entry of vessels into public swimming areas and establishing speed zones at public boat launching ramps, marinas, or boat service areas and on other congested water areas where there are demonstrated water safety hazards. Enforcement of such special regulations shall be dependent upon placement and maintenance of regulatory markers in accordance with the Uniform State Waterway Marking System by such agency or agencies as may be designated by the Wildlife Resources Commission.

(1959, c. 1064, s. 15; 1965, c. 394; 1969, c. 1093, s. 4; 1977, c. 424; 1983 (Reg. Sess., 1984), c. 1082, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, deleted "Upon petition to it" at the beginning of the first sentence of subsection (a), deleted "in accordance with any standards that may have been developed by the North Carolina Water Safety Committee" at the end of the second sentence of subsection (a), and rewrote the first paragraph of subsection (b), which formerly contained subdivisions (1) and (2).

Article 2.

Local Water Safety Committees.

§§ 75A-20 to 75A-25: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1082, s. 3, effective July 5, 1984.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1082, s. 2, rewrote the title of Article 2 of Chapter 75A, which formerly referred to the North Carolina Water Safety Committee.

Chapter 76A.

Navigation and Pilotage Commissions.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

Article 1.

General Provisions.

Sec.

76A-1. Commission established; powers generally.

Sec.

76A-5. Duties and authority.

76A-6. Classes of licenses.

Article 3.

Commission Funds.

76A-24. Expenses of the Commission.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 1.

General Provisions.

§ 76A-1. Commission established; powers generally.

In consideration of the requirement for the safe and expeditious movement of waterborne commerce on the navigable waters of the State, it is deemed necessary to establish the Cape Fear Navigation and Pilotage Commission, hereinafter referred to as the Commission. The Commission shall have the exclusive power to license and regulate a group of river pilots familiar with the waters of the Cape Fear River and Bar to best guide vessels within those waters and to exercise authority over navigation in the Cape Fear and Bar and to and from the sea buoy of the port. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 1.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, inserted "exclusive" preceding "power to license" and added "and to exercise authority over navigation in the Cape Fear River and Bar to and from the sea buoy of the port" in the second sentence.

§ 76A-5. Duties and authority.

(a) Rules and Regulations, Pilotage. — The Commission shall make and establish such rules and regulations as necessary and desirable respecting the qualifications, arrangements and station of pilots and for the control of navigation within the Cape Fear River and from and to the Cape Fear Bar and the sea buoys. In the development of such rules and regulations, the Commission should request the advice of the U.S. Coast Guard, the U.S. Corps of Engineers, the Pilots Association, other maritime interests and any other party that the Commission might deem beneficial.

(1981, c. 910, § 1; 1983 (Reg. Sess., 1984), c. 1081, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, added "and for the control of navigation within the Cape Fear River and from and to the Cape Fear Bar and the sea buoys" at the end of the first sentence.

§ 76A-6. Classes of licenses.

The Commission shall have general authority to issue two [three] classes of licenses:

(3) Apprentice. — A license to engage in a program, approved by the Commission, as apprentice pilot under the terms of G.S. 76A-12. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — The word "three" has been inserted in the introductory language by the editor in light of the addition of subdivision (3) by Session Laws 1983 (Reg. Sess., 1984), c. 1081, s. 3.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, added subdivision (3).

Article 3.

Commission Funds.

§ 76A-24. Expenses of the Commission.

The pilots association shall pay to the Commission according to rules prescribed by the Commission a percentage of pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars ($3,000) at the end of the fiscal year shall be returned to the pilot association on a prorated basis determined and distributed by the Commission. The Commission, in carrying out its duties, may incur necessary legal and auditing expenses and expenses for its travel and investigation which in addition to the one hundred dollars ($100.00) per meeting fee and other allowances provided by law shall be paid from the foregoing funds. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 4.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, added the last sentence.

Chapter 78A.

North Carolina Securities Act.

Article 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

CASE NOTES

Applied in Umstead v. Durham Hosiery Mills, Inc., 578 F. Supp. 342 (M.D.N.C. 1984).

Chapter 78B.

Tender Offer Disclosure Act.

§ 78B-1. Title.

Legal Periodicals. —

For comment discussing the validity and effect of North Carolina's Tender Offer Disclosure Act in light of Edgar v. MITE Corp., 102 S. Ct. 2629 (1982), see 19 Wake Forest L. Rev. 267 (1983).

Chapter 84.

Attorneys-at-Law.

Article 3.

Arguments.

§ 84-14. Court's control of argument.

CASE NOTES

Duty to Censure Improper Remarks. — The trial court has a duty, upon objection, to censure remarks which are not warranted by the law or evidence or are calculated to mislead or prejudice the jury, and, if the impropriety is gross, it is proper for the trial judge, even in the absence of objection, to correct the abuse ex mero motu. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

While it is true that in jury trials the whole case as well as of law as of fact may be argued to the jury, and counsel's freedom of argument should not be impaired without good reason, argument is not without limitation. Thus, when the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

Failure to Sustain Objection to Remark with No Basis in Law or Fact. — A trial court errs as a matter of law in failing to sustain plaintiff's objection to the remarks of defendants' counsel, which remarks had no basis in law or fact, but rather injected extraneous considerations concerning defendants' financial situation so far as their capacity to respond to damages was concerned. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

Article 4.

North Carolina State Bar.

§ 84-24. Admission to practice.

CASE NOTES

Cited in In re Moore, 308 N.C. 771, 303 S.E.2d 810 (1983).

§ 84-28. Discipline and disbarment.

Legal Periodicals. — For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

CASE NOTES

Applied in North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983).

Cited in North Carolina State Bar v. Braswell, — N.C. App. —, 313 S.E.2d 272 (1984).

§ 84-28.1. Disciplinary hearing commission.

CASE NOTES

Applied in North Carolina State Bar v. Braswell, — N.C. App. —, 313 S.E.2d 272 (1984).

Chapter 87.

Contractors.

Article 1.

General Contractors.

Sec.
87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Article 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

CASE NOTES

The purpose of this Article. —

The express language of the licensing statute indicates that it is designed to insure competence within the construction industry. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

One correctly stated purpose of protection from incompetent builders does not lessen purposes of protection from incompetence in the other enumerated activities of this section. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., — N.C. App. —, 310 S.E.2d 615 (1984).

For interpretation of this section, see Duke Univ. v. American Arbitration Ass'n, 64 N.C. App. 75, 306 S.E.2d 584, cert. denied, 309 N.C. 819, 310 S.E.2d 349 (1983).

Applicability of Section Generally. — This section is equally applicable to the clearing and grading required for agricultural purposes as it is to the clearing and grading required for building purposes. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., — N.C. App. —, 310 S.E.2d 615 (1984).

Unlicensed Person May Not Recover, etc. —

The general rule is that when an unlicensed person contracts with an owner to construct a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. Coats v. Jones, 63 N.C. App. 151, 303 S.E.2d 655, aff'd, 309 N.C. 815, 309 S.E.2d 253 (1983).

Although the statute does not expressly preclude an unlicensed contractor's suit against an owner for breach of contract, the contractor may not recover on the contract or in quantum meruit when he has ignored the protective statute. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Denial of Recovery Effectuates Statutory Purpose. — Public policy considerations militate against permitting unlicensed general construction contractors to enforce their contracts. Denying the contractor the right to enforce his contract effectuates the statutory purpose and legislative intent of providing the public with optimum protection. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

There can be no substantial compliance with the licensing statutes, where an unlicensed contractor has illegally entered into a contract. Neither may the contractor recover for extras, additions or changes made during construction commenced pursuant to the contract. Such a contract is not, however, void. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

In recognition of the essential illegality of an unlicensed contractor's entering into a construction contract for which a license is required and in order to give full effect to the legislative intent to furnish protection to the public by strict licensing requirements, the Supreme Court of North Carolina rejects the doctrine of substantial compliance, cognizant that harsh consequences may sometimes fall on those who do contracting work without a license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Subsequent Procurement of License Does Not Validate Contract. — The existence of a license at the time the contract is signed is determinative and great weight is attached to the significant moment of the entrance of the parties into the relationship. Accordingly, a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a

license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Expiration of License during Construction. — If a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate the statutes, the contractors themselves bear both the responsibility and the blame. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Supervision of unlicensed contractor by licensed contractor does not constitute compliance with licensing requirements of this section. Sager v. W.M.C., Inc., 64 N.C. App. 546, 307 S.E.2d 585 (1983).

Subcontractors Not Required, etc. —

There is no injury to the public, as contemplated by the licensing statutes, which will arise from the enforcement of a lien by a subcontractor where the lien arises out of a valid contract between an unlicensed general contractor and a property owner. Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

The inability of a general contractor, because of noncompliance with a licensing requirement, to recover on a contract with a property owner will not prevent a subcontractor as subrogee from recovery on the rights created by that same contract. Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

Unregulated Parties to Illegal Contract May Enforce It. — Others not regulated by the licensing statutes passed for their protection do not act illegally in becoming parties to a contract illegally entered into by an unlicensed contractor. The policy underlying the licensing statutes would not be served by preventing enforcement by those for whose protection the statutes were passed. These parties may enforce the contract against the unlicensed contractor. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

The licensing statutes should not be used as a shield to avoid a just obligation owed to an innocent party. The courts will not impose penalties for the failure to comply with licensing requirements in addition to those specifically set out in the statute. Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

Applied in Coats v. Jones, 309 N.C. 815, 309 S.E.2d 253 (1983).

§ 87-10. Application for license; examination; certificate; renewal.

CASE NOTES

Purpose of Examination. — By requiring this examination, the legislature seeks to guarantee skill, training and ability to accomplish such construction in a safe and workmanlike fashion. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Unlicensed Party, etc. —

Unless a general contractor has substantially complied with the licensing provisions of this section, it may not recover against the owner either under its contract or in quantum meruit. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., — N.C. App. —, 310 S.E.2d 615 (1984).

Denial of Recovery Effectuates Statutory Purpose. — Public policy considerations militate against permitting unlicensed general construction contractors to enforce their contracts. Denying the contractor the right to enforce his contract effectuates the statutory purpose and legislative intent of providing the public with optimum protection. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

There can be no substantial compliance with the licensing statutes, where an unlicensed contractor has illegally entered into a contract. Neither may the contractor recover for extras, additions or changes made during construction commenced pursuant to the contract. Such a contract is not, however, void. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

In recognition of the essential illegality of an unlicensed contractor's entering into a construction contract for which a license is required and in order to give full effect to the legislative intent to furnish protection to the public by strict licensing requirements, the Supreme Court of North Carolina rejects the doctrine of substantial compliance, cognizant that harsh consequences may sometimes fall on those who do contracting work without a license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Subsequent Procurement of License Does Not Validate Contract. — The existence of a license at the time the contract is signed is

determinative and great weight is attached to the significant moment of the entrance of the parties into the relationship. Accordingly, a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Expiration of License during Construction. — If a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate the statutes, the contractors themselves bear both the responsibility and the blame. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Stated in Sample v. Morgan, — N.C. App. —, 311 S.E.2d 47 (1984).

Cited in Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Any person, firm, or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in G.S. 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in the State, except as provided for in this Article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the Board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, and any architect or engineer who recommends to any project owner the award of a contract to anyone not properly licensed under this Article, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars ($500.00) or imprisonment of three months, or both fine and imprisonment in the discretion of the court. And the Board may, in its discretion, use its funds to defray the expense, legal or otherwise, in the prosecution of any violations of this Article. No architect or engineer shall be guilty of a violation of this section if his recommendation to award a contract is made in reliance upon current written information received by him from the appropriate Contractor Licensing Board of this State which information erroneously indicates that the contractor being recommended for contract award is properly licensed. (1925, c. 318, s. 12; 1931, c. 62, s. 3; 1937, c. 429, s. 6; 1983 (Reg. Sess., 1984), c. 970, s. 2.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, substituted "this State" for "the State" near the beginning of the first sentence, substituted "who recommends to any project owner the award of a contract to anyone not properly licensed" for "who receives or considers the bid from anyone not properly licensed" near the end of the first sentence and added the last sentence.

CASE NOTES

Applied in Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983); Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

Chapter 88.

Cosmetic Art.

Sec.

88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

On and after June 30, 1933, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established and, except as provided in G.S. 88-7.1, the practice of cosmetic art shall not be performed outside of a licensed and regularly inspected beauty establishment.

The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Duplin, Guilford, Jones, Lenoir, Mecklenburg, Onslow, Randolph, Richmond, Sampson, Scotland.

On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. The shop of such applicant shall be inspected and approved by the State Board of Cosmetic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars ($25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee required for such permit shall be three dollars ($3.00) per active booth in said shop.

Thereafter, all permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. No permit or certificate shall be transferable from one location to another or from one owner to another at the same location. Each cosmetic art shop permit shall be conspicuously posted

within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 26, 1984, deleted a reference to Durham County from the last sentence of the second paragraph.

Chapter 89E.

Geologists Licensing Act.

Sec.
89E-1. Short title.
89E-2. Purpose.
89E-3. Definitions.
89E-4. North Carolina Board for Licensing of Geologists; appointments; terms; composition.
89E-5. Functions and duties of the Licensing Board.
89E-6. Exemptions.
89E-7. Limitations.
89E-8. Applications.
89E-9. Minimum qualifications.
89E-10. Examinations.
89E-11. Comity.
89E-12. Issuance, renewal and replacement of licenses.
89E-13. Seals; requirements.
89E-14. Records.
89E-15. Roster of licensed geologists.
89E-16. Code of professional conduct.
89E-17. Complaints.
89E-18. Prohibitions; unlawful acts.
89E-19. Disciplinary procedures.
89E-20. Hearing procedures.
89E-21. Reissuance of license.
89E-22. Misdemeanor.
89E-23. Injunction.
89E-24. Attorney General as legal advisor.

§ 89E-1. Short title.

This Chapter shall be known as the North Carolina Geologists Licensing Act. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1074, s. 2, provides that for the purposes of the appointment of the initial Board and of administrative preparation for the implementation of this Chapter, the act shall become effective July 1, 1983, and that for all other purposes, the act shall become effective January 1, 1985.

§ 89E-2. Purpose.

The purposes of this Chapter are to protect life, property, health and public welfare through the regulation of the practice of geology in the State of North Carolina; to define the practice of geology as a profession, establishing minimum professional standards of ethical conduct, professional responsibility, educational and experience background; and to prevent abuses of the practice of geology by untrained or unprincipled individuals. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-3. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Board" means the North Carolina Board for Licensing of Geologists.

(2) "Geologist". The term "geologist", within the intent of this Chapter, shall mean a person who is trained and educated in the science of geology.

(3) The term "geologist-in-training" means a person who has taken and successfully passed the portion of professional examination covering fundamental or academic geologic subjects, prior to his completion of the requisite years of experience in geologic work as provided for in this Chapter.

(4) "Geology" means the science dealing with the earth and its history; investigation, prediction and location of the materials and structures which compose it; the natural processes that cause change in the earth; and the applied science of utilizing knowledge of the earth and its constituent rocks, minerals, liquids, gases and other materials for

the benefit of mankind. This definition shall not include any service or creative works, the adequate performance of which requires engineering education, training, and experience.

(5) The term "good moral character" means such character as tends to ensure the faithful discharge of the fiduciary duties of the licensed geologist to his client.

(6) "License" means a certificate issued by the Board recognizing the individual named in this certificate as meeting the requirements for licensing under this Chapter.

(7) "Licensed geologist" means a person who is licensed as a geologist under the provisions of this Chapter.

(8) "Public practice of geology" means the performance for others of geological service or work in the nature of work or consultation, investigation, surveys, evaluations, planning, mapping and inspection of geological work, in which the performance is related to the public welfare of safeguarding of life, health, property and the environment, except as specifically exempted by this Chapter. The definition shall not include or allow the practice of engineering as defined in Chapter 89C of the North Carolina General Statutes.

(9) The term "qualified geologist" means a person who possesses all of the qualifications specified in this Chapter for licensing except that he or she is not licensed.

(10) The term "responsible charge of work" means the independent control and direction by the use of initiative, skill and independent judgment of geological work or the supervision of such work.

(11) The term "subordinate" means any person who assists a licensed geologist in the practice of geology without assuming the responsible charge of work. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-4. North Carolina Board for Licensing of Geologists; appointments; terms; composition.

(a) The North Carolina Board for Licensing of Geologists shall have the power and responsibility to administer the provisions of this Chapter in compliance with the Administrative Procedures Act, G.S. Chapter 150A.

(b) The Board shall consist of five members appointed by the Governor in the manner hereinafter prescribed, and in addition the State geologist shall serve on the Board ex officio. The Governor may remove any member of the Board for neglect of duty or malfeasance or violation of this Chapter or conviction of a felony or other crime of moral turpitude, but for no other reason.

(c) Each member of the Board shall be a citizen of the United States and shall have been a resident of this State for at least six months immediately preceding his or her appointment.

(d) All members of the initial Board shall be appointed by the Governor and shall at the time of their appointment qualify for licensing under this Chapter except for the lay member appointee. At all times at least one member of the Board shall be an academic geologist; one member shall be a salaried company geologist; one member shall be an independent or consultant geologist; one member shall be a representative from the mining industry; one member shall be a consumer or lay member who is not a geologist; and in addition, the State geologist shall serve as a permanent ex officio member.

(e) After the establishment of the initial Board, all members, with the exception of the lay member, shall be so licensed under the provisions of this Chapter. The term of office of each member of the Board shall be three years; provided, however, that of the members first appointed, one shall be appointed for a term of one year; two for terms of two years; and two for terms of three

years in the discretion of the Governor. No member shall serve more than two consecutive three-year terms without an interruption in service of at least one year.

(f) Each term of service on the Board shall expire on the 30th day of June of the year in which the term expires. As the term of a member expires, the Governor shall make the appointment for a full term, or, if a vacancy occurs for any other reason, for the remainder of the unexpired term.

(g) Members of the Board may receive compensation for their services and reimbursement for expenses incurred in the performance of duties required by this Chapter at the rates prescribed in G.S. 138-5, subject to availability of funds.

(h) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, the necessary personnel for performance of its functions, and fix their compensation within the limits of funds available to the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-5. Functions and duties of the Licensing Board.

(a) The Board shall administer and enforce the provisions of this Chapter.

(b) The Board shall elect from its membership a chairman, a vice-chairman and a secretary-treasurer, and adopt rules, consistent with the Administrative Procedures Act, to govern its proceedings. A majority of the membership of the Board shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for licensing under this Chapter, and shall issue a license to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all licenses issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Chapter from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year.

(f) The Board shall hold a meeting within 30 days after a quorum of its members is first appointed and thereafter shall hold at least two regular meetings each year.

(g) The Board shall establish and receive fees as required by this Chapter. In establishing fees, the Board shall consider exemptions from fees or a reduction in licensing fees for those persons otherwise qualified for licensing under this Chapter but who perform geologic work or services less than 15 days per year.

(h) The Board shall have such other powers and duties as are necessary to carry out the provisions of this Chapter.

(i) The Board shall have the power to establish or approve reasonable standards for licensing and renewal of licenses of geologists, including, but not limited to the power to adopt or use examination materials and accreditation standards of any duly professionally recognized accrediting agency. The Board shall have the power to establish reasonable standards for continuing professional education for geologists, provided that for renewal of license no examination shall be required. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-6. Exemptions.

Any person except as specifically exempted below who shall publicly practice or offer to publicly practice geology in this State is subject to the provisions of this Chapter. The following persons are exempt:

(1) Persons engaged solely in teaching the science of geology or engaged solely in geologic research in this State may pursue their teaching

and/or research without licensing. A teacher or researcher must, however, be a licensed geologist if he or she performs geologic work and services for which a licensed geologist is required by this Chapter.

(2) Officers and employees of the United States of America and the State of North Carolina practicing solely as such officers or employees.

(3) Officers and employees of petroleum companies practicing solely as such officers and employees and not offering their professional services to the public for hire.

(4) A subordinate to a geologist or a geologist-in-training licensed under this Chapter insofar as he or she acts solely in such capacity. This exemption does not permit any such subordinate to practice geology for others in his own right or use the term "licensed geologist". (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-7. Limitations.

(a) This Chapter does not prohibit one or more geologists from practicing through the business organization of a sole proprietorship; partnership; corporation or professional association. In a partnership or corporation or professional association, the primary activity of which consists of geological services, at least one partner or officer shall be a licensed geologist as defined in this Chapter.

(b) This Chapter shall not be construed to prevent or to affect:

(1) The practice of any profession or trade for which a license is required under any other law of this State, or the practice of registered professional engineers from lawfully practicing soils mechanics, foundation engineering and other professional engineering as provided in the North Carolina General Statutes, or licensed architects or landscape architects from lawfully practicing architecture or landscape architecture, or the practice of soil science by professionals certified by the Soil Science Society of North Carolina, respectively as provided in the General Statutes;

(2) The public practice of geology by a person not a resident of and having no established place of business in this State, when such practice does not exceed in the aggregate more than 90 days in any calendar year, and provided such person is duly licensed to practice such profession in another state where the requirements for a license are not lower than those specified in this Chapter for obtaining the license required for such work; and provided further that such nonresident shall file with the Board within 10 days of entering this State for commencing of such work, a statement giving his name, residence, the number of his license, and by what authority issued, and upon the completion of the work, a statement of the time engaged in such work within the State; or

(3) The practice of a person not a resident and having no established place of business in this State, or who has recently become a resident hereof, practicing or offering to practice herein for more than 90 days in any calendar year the profession of geology, if he is licensed in another state or qualified as defined herein, if he shall have filed with the Board an application for a license and shall have paid the fee required by this Chapter. Such practice shall be deemed a provisional practice and shall continue only for such time as the Board requires reasonably for the consideration of the applicant for licensing under this Chapter as a geologist. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-8. Applications.

An application for licensing as a geologist shall be made under oath, shall show the applicant's education and a summary of his geological work, plus other relevant criteria to be determined by the Board. The Board shall have the power to determine a reasonable application fee which shall accompany each application. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-9. Minimum qualifications.

An applicant shall be eligible for a license as a geologist in North Carolina provided that each applicant meets the following minimum qualifications:

(1) Be of good moral and ethical character.

(2) Have graduated from an accredited college or university, and have a degree with a major in geology, engineering geology or geological engineering or related geologic science; or have completed 30 semester hours or the equivalent in geological science courses leading to a major in geology, of which at least 24 hours of the equivalent were upper level undergraduate courses or graduate courses. The Board shall waive the academic requirements for a person already practicing geology at the time this Chapter is enacted, provided application for license is made not later than one year after appointment of the initial Board and provided further that the applicant can provide evidence to satisfy the Board that he or she is competent to engage in the public practice of geology.

(3) Successfully pass such examination established by the Board which shall be designed to demonstrate that the applicant has the necessary knowledge and requisite skill to exercise the responsibilities of the public practice of geology. The Board shall waive the examination for licensing as a geologist of an applicant who makes written application to the Board not later than one year after appointment of the initial Board, and who otherwise meets the qualification of this Chapter. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1074, s. 2, provides that for the purposes of the appointment of the initial Board and of administrative preparation for the implementation of this Chapter, the act shall become effective July 1, 1983, and that for all other purposes, the act shall become effective January 1, 1985.

The act was ratified July 3, 1984.

§ 89E-10. Examinations.

(a) Examinations shall be formulated and conducted by the Board at such time and place as the Board shall determine, but shall be held at least annually.

(b) The Board shall determine the fee required for examination. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-11. Comity.

A person holding a license to engage in the practice of geology, on the basis of comparable licensing requirements issued to him by a proper authority by the State, territory, or possession of the United States or the District of Columbia, and who, in the opinion of the Board otherwise meets the requirements of this Chapter based upon verified evidence may, upon application, be licensed without further examination. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-12. Issuance, renewal and replacement of licenses.

(a) The Board shall issue a license upon payment of the license fee as fixed by the Board to any applicant who has satisfactorily met all the requirements of the Chapter as administered by the Board. Licenses shall show the full name of the registrant, shall give a serial number, and shall be signed by the chairman and secretary of the Board under the seal of the Board. The issuance of a license by the Board shall be prima facie evidence that the person named therein is entitled to all the rights and privileges of a licensed geologist while the license remains in full force and effect.

(b) All licenses shall expire at such interval as may be determined by the Board, unless licenses are renewed. All applications for renewal shall be filed with the Board under rules and regulations it shall adopt and which renewal shall be accompanied by the renewal fee prescribed by the Board. A license which has expired for failure to renew may only be restored after application and payment of the prescribed restoration fee, provided the renewal applicant meets all other provisions of this Chapter.

(c) A new license to replace any license lost, destroyed or mutilated may be issued, subject to the rules of the Board and payment of a fee set by the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-13. Seals; requirements.

Each geologist licensed hereunder, upon the issuance of a license, shall obtain from the secretary at a cost prescribed by the Board, a seal of the design authorized by the Board bearing the licensee's name and the legend "Licensed Geologist — State of North Carolina". All drawings, reports or other geologic papers or documents involving geologic work as defined in this Chapter which shall have been prepared or approved by a licensed geologist or a subordinate employee under his direction for the use of or for delivery to any person or for public record within this State shall be signed by him or her and impressed with the said seal or the seal of a nonresident practicing under the provisions of this Chapter, either of which shall indicate his or her responsibility therefor. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-14. Records.

(a) The Board shall keep a public record of its proceedings and a register of all applications for licensing.

(b) The register shall show:

(1) The name, the age and the residency of each applicant;
(2) The date of application;
(3) The place of business of such applicant;
(4) His or her education and other qualifications;
(5) Whether or not an examination was required;
(6) Whether the applicant was licensed;
(7) Whether a license was granted;
(8) The dates of the action by the Board; and
(9) Such other information as may be deemed necessary by the Board. All official records of the Board or affidavits by the secretary as to the content of such records shall be prima facie evidence of all matters required to be kept therein.

(c) The Board shall treat as confidential and not subject to disclosure except to the extent required by law or by rule or regulation of the Board individual test scores and applications and material relating thereto, including letters of reference relating to an application. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-15. Roster of licensed geologists.

The secretary shall keep a record and shall publish annually a roster showing the names and places of business and residence addresses of all licensed geologists. Copies of this roster shall be made available to the public upon request and payment of reasonable fee for copying established by the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-16. Code of professional conduct.

This Board shall cause to have prepared and shall adopt a code of professional conduct which shall be made known in writing to every licensee and applicant for licensing under this Chapter and which shall be published by the Board. Such publication shall constitute due notice to all licensees. The Board may revise and amend this code of ethics from time to time after due notice and opportunity for hearing to all licensed members and the public for comment before adoption of the revision or amendments. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-17. Complaints.

Any person may file written charges with the Board against any licensee pursuant to rules and regulations adopted by the Board; provided however, such charges or allegations shall be in writing and shall be sworn to by the person or persons making them and shall be filed with the secretary. The Board shall have the authority and shall be under a duty to investigate reasonably all valid complaints. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-18. Prohibitions; unlawful acts.

After the effective date of this Chapter:

(1) It shall be unlawful for any person other than a licensed geologist or a subordinate under his direction to prepare any geologic plans, reports or documents in which the performance is related to the public welfare or safeguarding of life, health, property or the environment.

(2) It shall be unlawful for any person to publicly practice, or offer to publicly practice, geology in this State as defined in the provisions of this Chapter, or to use in connection with his or her name or otherwise assume, or advertise any title or description tending to convey the impression that he or she is a licensed geologist, unless such person has been duly licensed or exempted under the provisions of this Chapter.

(3) After one year following the effective date of this act, it shall be unlawful for anyone other than a geologist licensed under this Chapter to stamp or seal any plans, plats, reports or other documents with the seal or stamp of a licensed geologist, or to use in any manner the title "Licensed Geologist" unless that person is licensed hereunder.

(4) It shall be unlawful for any person to affix his or her signature to or to stamp or seal any plans, plats, reports, or other documents after the licensing of the person named thereon has expired or has been suspended or revoked unless the license has been renewed or reissued. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1074, s. 2, provides that for the purposes of the appointment of the initial Board and of administrative preparation for the implementation of this Chapter, the act shall become effective July 1, 1983, and that for all other purposes, the act shall become effective January 1, 1985.

§ 89E-19. Disciplinary procedures.

The Board may, consistent with the provisions of Chapter 150A of the General Statutes, refuse to grant or to renew, may suspend, or may revoke the license of any person licensed under this Chapter who has violated the provisions of this Chapter or a rule or regulation of the Board, or who has been convicted of a misdemeanor under this Chapter, or who has been convicted of a felony or who has been found by the Board to have been guilty of gross unprofessional conduct, dishonest practice or incompetence or fraud or deceit in obtaining a license or in aiding or abetting by fraud or deceit another person's obtaining a license. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-20. Hearing procedures.

(a) The Board shall develop procedures for investigation, prehearing and hearing of disciplinary actions; such disciplinary actions shall be conducted pursuant to the provisions of Article 3, Chapter 150A of the General Statutes.

(b) Any person aggrieved by a decision of the Board other than a decision in a disciplinary action may petition the Board for a hearing pursuant to the provisions of Article 3, Chapter 150A of the General Statutes.

(c) Judicial review of a final agency decision is available in the manner prescribed by Article 4, Chapter 150A of the General Statutes. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-21. Reissuance of license.

The Board, by a majority vote of the quorum, may reissue a license to any person whose license has been revoked when the Board finds upon written application by the applicant that there is good cause to justify such reissuance. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-22. Misdemeanor.

Any person who shall willfully practice publicly, or offer to practice publicly, geology for other natural or corporate persons in this State without being licensed in accordance with the provisions of this Chapter, or any person presenting or attempting to use as his own the license or the seal of another, or any person who shall give any false or forged evidence of any kind in obtaining a license, or any person who shall falsely impersonate any other licensee of like or different name, or any person who shall attempt to use an expired or revoked license or practice at any time during a period the Board has suspended or revoked the license, or any person who shall violate the provisions of this Chapter shall be guilty of a misdemeanor; upon conviction thereof, such person shall be punishable by a fine of not more than five hundred dollars ($500.00), by imprisonment of not more than six months, or both such fine and imprisonment. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-23. Injunction.

As an additional remedy, the Board shall have the authority to proceed in a superior court appropriate jurisdiction to enjoin and restrain any natural or corporate person from violating the prohibitions of this Chapter. The Board shall not be required to post bond in connection with obtaining either provisional, preliminary or permanent injunctive relief pursuant to the North Carolina Rules of Civil Procedure or G.S. 1-485 et seq. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-24. Attorney General as legal advisor.

The Attorney General or any assistant or associate in the Department of Justice selected by him shall act as legal advisor to the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

Chapter 90.

Medicine and Allied Occupations.

Article 1.

Practice of Medicine.

Sec.
90-15. License fee; salaries, fees, and expenses of Board.
90-15.1. Registration every two years with Board.

Article 8.

Chiropractic.

90-154. Grounds for professional discipline.

Article 18C.

Marital and Family Therapy Certification Act.

90-270.63, 90-270.64. [Reserved.]

Article 18D.

Occupational Therapy.

90-270.65. Title.
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90-270.66. Declaration of purpose.
90-270.67. Definitions.
90-270.68. Establishment of Board, terms of members, meetings, compensation.
90-270.69. Powers and duties of the Board.
90-270.70. Requirements for licensure.
90-270.71. Examination.
90-270.72. Exemption from requirements.
90-270.73. Issuance of license.
90-270.74. Provisional licenses.
90-270.75. Renewal of license.
90-270.76. Suspension, revocation and refusal to renew license.
90-270.77. Fees.
90-270.78. False representation of license prohibited.
90-270.79. Violation a misdemeanor.
90-270.80. Injunctions.
90-270.81. Persons and practices not affected.

Article 1.

Practice of Medicine.

§ 90-14. Revocation, suspension, annulment or denial of license.

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-15. License fee; salaries, fees, and expenses of Board.

Each applicant for a license by examination shall pay to the treasurer of the Board of Medical Examiners of the State of North Carolina a fee which shall be prescribed by said Board in an amount not exceeding the sum of four hundred dollars ($400.00) before being admitted to the examination. Whenever any license is granted without examination, as authorized in G.S. 90-13, the applicant shall pay to the treasurer of the Board a fee in an amount to be prescribed by the Board not in excess of one hundred dollars ($100.00). Whenever a limited license is granted as provided in G.S. 90-12, the applicant shall pay to the treasurer of the Board a fee of fifty dollars ($50.00), except where a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training is granted, the applicant shall pay a fee of ten dollars ($10.00). A fee of ten dollars ($10.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in

advance to the treasurer of the Board of Medical Examiners of the State of North Carolina, to be held by him as a fund for the use of said Board. The compensation and expenses of the members and officers of the said Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of said fund, upon the warrant of the said Board and all expenses proper and necessary in the opinion of the officers and members of said Board shall be fixed by the Board but shall not exceed ten dollars ($10.00) per day per member for time spent in the performance and discharge of his duties as a member of said Board, and reimbursement for travel and other necessary expenses incurred in the performance of his duties as a member of said Board. Any unexpended sum or sums of money remaining in the treasury of said Board at the expiration of the terms of office of the members thereof shall be paid over to their successors in office.

For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C. S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1; 1981, c. 573, s. 15; 1983 (Reg. Sess., 1984), c. 1063, s. 1.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, substituted "four hundred dollars ($400.00)" for "two hundred dollars ($200.00)" in the first sentence.

§ 90-15.1. Registration every two years with Board.

Every person heretofore or hereafter licensed to practice medicine by said Board of Medical Examiners shall, during the month of January, 1958, and during the month of January in every even-numbered year thereafter, register with the secretary-treasurer of said Board his name and office and residence address and such other information as the Board may deem necessary and shall pay a registration fee fixed by the Board not in excess of one hundred dollars ($100.00). In the event a physician fails to register as herein provided he shall pay an additional amount of twenty dollars ($20.00) to the Board. Should a physician fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such physician may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which may be due, not to exceed a total of two hundred dollars ($200.00) of accumulated fees and penalties, the license of any such physician shall be reinstated. (1957, c. 597; 1969, c. 929, s. 5; 1979, c. 196, s. 2; 1983 (Reg. Sess., 1984), c. 1063, s. 2.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, substituted "one hundred dollars ($100.00)" for "twenty-five dollars ($25.00)" in the first sentence and "twenty dollars ($20.00)" for "ten dollars ($10.00)" in the second sentence.

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definition.

Legal Periodicals. — For article discussing the North Carolina medical malpractice statute, see 62 N.C.L. Rev. 711 (1984).

CASE NOTES

Stated in Tice v. Hall, — N.C. —, 313 S.E.2d 565 (1984).

§ 90-21.12. Standard of health care.

Legal Periodicals. — For article discussing the North Carolina medical malpractice statute, see 62 N.C.L. Rev. 711 (1984).

CASE NOTES

Intended purpose of this section was merely to conform the statute more closely to the existing case law applying a "same or similar community" standard of care. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

This section does not abrogate the common-law standards of care required of a physician. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

The General Assembly did intend to eliminate the previously existing common-law obligations of a physician to his patient. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

The standard of care adopted in this section reflects the decisional law of the courts. Tice v. Hall, 63 N.C. App. 27, 303 S.E.2d 832 (1983).

When a physician holds himself out as a specialist, he is required to bring to the care of his patients more than the average degree of skill possessed by general practitioners. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

An instruction using the term "honest error" could easily be interpreted by the jury to mean that a physician could not be liable for negligence unless he was somehow dishonest, particularly when the term is not defined with reference to the physician's other obligations to the patient. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

Because of the potentially misleading and exculpatory import of the term, the phrase "honest error" is inappropriate in an instruction on the liability of a doctor for medical malpractice and should not hereafter be given. Language in the prior cases which may have sanctioned the use of this term in defining a physician's liability for medical negligence is hereby expressly disapproved. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

Instruction fully explaining doctor's duty to his patient must combine elements of both this section and phraseology from the earlier cases. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

An instruction stating that a physician is not an insurer of results should not be given when no issue concerning a guarantee has been raised. Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

Inapplicable to Dental Licensing Board Disciplinary Hearing. — While this section establishes a standard of care below which a health care provider may be held civilly liable in damages, § 90-41 and this section serve different purposes. Admittedly the violations for which a dentist may be subject to discipline include acts of "malpractice," § 90-41(a)(19). However, this language was not intended to incorporate a standard applicable in actions for damages "for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of . . . dental . . . care." In fact, § 90-41 was first enacted in 1935, long before the 1975 enactment of this section. Therefore, the standard of health care enunciated under this section is inapplicable to a professional licensing board disciplinary hearing. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Showing required. —

In accord with 1st paragraph in 1983 Cum. Supp. See Moore v. Reynolds, 63 N.C. App. 160, 303 S.E.2d 839 (1983).

In order to withstand a motion for a directed verdict, etc. —

When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Mitchell v. Parker, — N.C. App. —, 315 S.E.2d 76 (1984).

Standard Must Be Established, etc. —

Usually, expert testimony is required to establish the standard, to show its negligent violation, and to show that such negligent violation was the proximate cause of the injury complained of. Tice v. Hall, 63 N.C. App. 27, 303 S.E.2d 832 (1983).

Stated in Tice v. Hall, — N.C. —, 313 S.E.2d 565 (1984).

Cited in Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983); Grad v. Kaasa, — N.C. App. —, 314 S.E.2d 755 (1984).

§ 90-21.13. Informed consent to health care treatment or procedure.

Legal Periodicals. — For article discussing the North Carolina medical malpractice statute, see 62 N.C.L. Rev. 711 (1984).

CASE NOTES

Constitutionality. — See Dixon v. Peters, 63 N.C. App. 592, 306 S.E.2d 477 (1983).

§ 90-21.14. First aid or emergency treatment; liability limitation.

Legal Periodicals. — For article discussing the North Carolina medical mapractice statute, see 62 N.C.L. Rev. 711 (1984).

ARTICLE 2.

Dentistry.

§ 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

CASE NOTES

Purpose of Article. —

The Board of Dental Examiners, like all other professional licensing boards, was created to establish and enforce a uniform statewide minimum level of competency among its licensees. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-29. Necessity for license; dentistry defined; exemptions.

CASE NOTES

Stated in In re DeLancy, — N.C. App. —, 313 S.E.2d 880 (1984).

§ 90-41. Disciplinary action.

CASE NOTES

Standard of Practice. — The Dental Practice Act is silent as to the standard of practice by which a dentist's negligence or incompetence is to be measured. In considering the regulatory, licensing and disciplinary functions of the board, a statewide standard must be applied. That is, prior to invoking disciplinary measures as authorized under subsection (a) of this section, the board must first be satisfied that the care provided by the licensee was not in accordance with the standards of practice among members of the dentistry profession situated throughout the State of North Carolina at the time of the alleged violation. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

The decision of whether an applicant or licensee has violated any of the factors enumerated in this section authorizing disciplinary action must be viewed in the context of a uniform statewide standard. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Standard of Care under § 90-21.12 Is Inapplicable. — While § 90.21.12 establishes a standard of care below which a health care provider may be held civilly liable in damages, this section and § 90-21.12 serve different purposes. Admittedly the violations for which a dentist may be subject to discipline include acts of "malpractice." However, this language was not intended to incorporate a standard applicable in actions for damages "for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of . . . dental . . . care." In fact, this section was first enacted in 1935, long before the 1975 enactment of § 90-21.12. Therefore, the standard of health care enunciated under § 90-21.12 is inapplicable to a professional licensing board disciplinary hearing. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Board is not authorized to enter its final agency decision upon remand without the benefit of additional expert testimony that the care provided by the respondent was not in accordance with the standards of practice among members of the dentistry profession situated throughout the State at the time of the alleged violations. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

ARTICLE 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.27. Definitions.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 62(h), provides:

"Dispensing of Generic Drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning.

"As used in this subsection 'brand name' means the proprietary name the manufacturer

places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' shall have the same meaning as in § 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 62(h), provides:

"Dispensing of Generic Drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning.

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' shall have the same meaning as in § 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 90-85.29. Prescription label.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 62(h), provides:

"Dispensing of Generic Drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning.

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' shall have the same meaning as in § 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 90-85.30. Prescription record.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 62(h), provides:

"Dispensing of Generic Drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning.

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' shall have the same meaning as § 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 90-85.31. Prescriber and pharmacist liability not extended.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 62(h), provides:

"Dispensing of Generic Drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning.

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' shall have the same meaning as in § 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

CASE NOTES

Applied in State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983); State v. Boone, — N.C. —, 311 S.E.2d 552 (1984).

§ 90-87. Definitions.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983); State v. Brown, — N.C. —, 313 S.E.2d 585 (1984).

Cited in State v. Simmons, — N.C. App. —, 311 S.E.2d 357 (1984).

III. "MANUFACTURE."

Where an array of items all used as means to package and distribute cocaine were found on a table, from the plastic baggies to the tinfoil, from the cellophane tape to the wire ties, a rational trier of fact had sufficient evidence to convict one of manufacturing cocaine. State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983).

§ 90-92. Schedule IV controlled substances.

CASE NOTES

Applied in Little v. North Carolina State Bd. of Dental Exmrs., 64 N.C. App. 67, 306 S.E.2d 534 (1983).

§ 90-94. Schedule VI controlled substances.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

§ 90-95. Violations; penalties.

Legal Periodicals. —
For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Section is constitutional. —
In accord with 2nd paragraph in 1983 Cumulative Supplement. See State v. Porter, 65 N.C. App. 13, 308 S.E.2d 767 (1983), cert. denied and appeal dismissed, 310 N.C. 155, 311 S.E.2d 295 (1984).

The premise upon which the North Carolina Controlled Substances Act rests is that the substances so controlled are detrimental to the public; with that in mind the Legislature established presumptive sentences for the different crimes involving marijuana. State v. Coffey, 65 N.C. App. 751, 310 S.E.2d 123 (1984).

Weight of the marijuana is an essential element of trafficking in marijuana under subsection (h) of this section. State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Indictment Stating "in at Least 50 Pounds" Does Not Properly Charge Conspiracy to Traffic. — Conspiracy to traffic in marijuana was not alleged by an indictment containing the phrase "in at least 50 pounds," because "in at least 50 pounds" is not "in excess of 50 pounds." Because of the fatal error in failing to allege all the necessary elements of the offense, the indictment was invalid. State v. Goforth, 658 N.C. App. 302, 309 S.E.2d 488 (1983).

Evidence of Other Drug Violations. —
In accord with original. See State v. Weldon, 65 N.C. App. 376, 309 S.E.2d 263 (1983).

Evidence of other discoveries does tend to show defendant's guilty knowledge, where defendant leased and lived in the house where heroin was found, and she was physically present on the occasion of each search, during the first search, which occurred two months prior to the offense charged, heroin, a needle and syringe, and $648 were found on a table directly in front of defendant, and during the last search, which took place three months after the offense, heroin was found at an easily accessible location about five feet from defendant's back door, and $201 was found on her person. State v. Weldon, 65 N.C. App. 376, 309 S.E.2d 263 (1983).

Testimony that defendant's house had the reputation of being a site of illegal drug sale and use, although ordinarily considered hearsay, concerning the reputation of a place is admissible where it goes to show the intent of the person charged. State v. Weldon, 65 N.C. App. 376, 309 S.E.2d 263 (1983).

Applied in State v. Jamerson, 64 N.C. App. 301, 307 S.E.2d 436 (1983); State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983); State v. Boone, — N.C. —, 311 S.E.2d 552 (1984); State v. Brown, — N.C. —, 313 S.E.2d 585 (1984); State v. Siler, — N.C. —, 314 S.E.2d 547 (1984); State v. Siler, — N.C. App. —, 311 S.E.2d 23 (1984); State v. Holloway, — N.C. App. —, 311 S.E.2d 707 (1984).

Stated in State v. Atwell, 62 N.C. App. 652, 303 S.E.2d 407 (1983); State v. Willis, — N.C. App. —, 313 S.E.2d 173 (1984).

Cited in State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983); State v. Massenburg, — N.C. App. —, 310 S.E.2d 619 (1984); State v. Essick, — N.C. App. —, 314 S.E.2d 268 (1984).

IV. POSSESSION.

A. In General.

Purpose of Different Treatment of Offenses Involving Marijuana and Hashish. — In the Controlled Substances Act marijuana and hashish are treated differently only in this section, which sets the penalty for felony possession. Simple possession of each is a misdemeanor; possession of more than an ounce of marijuana is a felony; possession of more than one-tenth of an ounce of hashish is a felony. This distinction was apparently made by the legislature because the active ingredient in marijuana is contained in the plant's resin, which is more concentrated in the extracted

hashish than in the dried leaves of the plant itself. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

B. Possession with Intent to Sell or Deliver.

Felony possession of hashish is not a lesser included offense of possession with intent to sell and deliver hashish. The crime of felony possession of hashish contains an element that possession with the intent to sell and deliver hashish does not. The amount of hashish possessed is not an element of the crime of possessing with the intent to sell and deliver hashish, as established by subdivision (a)(1); whereas, under subdivision (d)(4), the crime of felony possession of hashish consists of possessing more than one-tenth of an ounce of hashish. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Misdemeanor Possession of Hashish as Included Offense. — Misdemeanor possession of hashish — the unauthorized possession of any quantity of the substance at all — is a lesser included offense of possession with intent to sell and deliver hashish. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

§ 90-98. Attempt and conspiracy; penalties.

CASE NOTES

Applied in State v. Jamerson, 64 N.C. App. 301, 307 S.E.2d 436 (1983).

§ 90-108. Prohibited acts; penalties.

CASE NOTES

Cited in State v. Coffey, 65 N.C. App. 751, 310 S.E.2d 123 (1984).

§ 90-112.1. Remission or mitigation of forfeitures; possession pending trial.

CASE NOTES

Applied in State v. Bass, 65 N.C. App. 801, 310 S.E.2d 150 (1984).

Article 5B.

Drug Paraphernalia.

§ 90-113.21. General provisions.

CASE NOTES

Stated in State v. Childers, — N.C. App. —, 311 S.E.2d 384 (1984).

§ 90-113.22. Possession of drug paraphernalia.

CASE NOTES

Stated in State v. Childers, — N.C. App. —, 311 S.E.2d 384 (1984).

ARTICLE 6.

Optometry.

§ 90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

ARTICLE 7.

Osteopathy.

§ 90-136. Refusal, revocation or suspension of license; misdemeanors.

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

ARTICLE 8.

Chiropractic.

§ 90-154. Grounds for professional discipline.

(b) The following are grounds for disciplinary action by the Board under subsection (a):

(1) Advertising services in a false or misleading manner;

(2) Conviction of a felony or of a crime involving moral turpitude;

(3) Addiction or severe dependency upon alcohol or other drugs which endangers the public by impairing a chiropractor's ability to practice safely;

(4) Unethical conduct in the practice of the profession as defined by rule or regulation of the Board;

(5) Negligence or incompetence in the practice of chiropractic;
(6) Committing an act or acts constituting malpractice in the practice of chiropractic;
(7) Rendering unacceptable care according to explicit standards adopted by the Board of Chiropractic Examiners;
(8) Engaging in a course of lewd or immoral conduct in connection with the delivery of chiropractic services to a patient;
(9) Committing a fraudulent act or acts or engaging in fraudulent conduct in connection with the delivery of or charging for chiropractic services;
(10) Offering to accept or accepting payment for services rendered by assignment from any third party payor after offering to accept or accepting whatever the third party payor covers as payment in full, if the effect of the offering or acceptance is to eliminate or give the impression of eliminating the need of payment by an insured of any required deductions applicable in the insured's policy;
(11) Submitting to any third payor a claim for a service or treatment without also providing upon request a copy of the claim to the insured;
(12) Reducing or offering to reduce, rebating or offering to rebate, discounting or offering to discount to an insured any payment, by the insured's third party payor to the licensee, for services or treatments rendered under the insured's policy;
(13) Advertising any reduced or discounted fees for services or treatments or advertising any free services or treatments without prominently stating in the advertisement the licensee's usual fee for the service or treatment which is the subject of the discount, rebate, or free offering;
(14) Submitting to any third party payor a claim for a service or treatment at a greater or an inflated fee or charge than the usual fee the licensee charges for that service or treatment when the service or treatment is rendered without third party reimbursement;
(15) Advertising a fee or charge for a service or treatment which is different from the fee or charge the licensee submits to third party payors for that service or treatment. (1917, c. 73, s. 14; C. S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3; 1981, c. 766, s. 7; 1983 (Reg. Sess., 1984), c. 1067, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 2, 1984, added subdivisions (b)(9) through (b)(15).

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-157.1. Free choice by patient guaranteed.

OPINIONS OF ATTORNEY GENERAL

This section is applicable to a self-insured employee health insurance plan operated by a county hospital. See opinion of Attorney General to Mr. J. Hoyte Stultz, Jr., Attorney for N.C. State Board of Chiropractic Examiners, 52 N.C.A.G. 80 (1983).

Article 9A.

Nursing Practice Act.

§ 90-171.37. Revocation, suspension, or denial of licensure.

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Article 12A.

Podiatrists.

§ 90-202.8. Revocation of certificate; grounds for; suspension of certificate.

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Article 16.

Dental Hygiene Act.

§ 90-229. Disciplinary measures.

CASE NOTES

Stated in In re DeLancy, — N.C. App. —, 313 S.E.2d 880 (1984).

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Article 18B.

Physical Therapy.

§ 90-270.35. Unlawful practice.

OPINIONS OF ATTORNEY GENERAL

A podiatrist may prescribe or refer physical therapy to a licensed physical therapist for the benefit of the podiatrist's patients. See opinion of Attorney General to Mr. E. Joseph Daniels, D.P.M., AACFS, President, North Carolina Board of Podiatry Examiners, 52 N.C.A.G. 70 (1982).

§ 90-270.36. Grounds for disciplinary action.

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

ARTICLE 18C.

Marital and Family Therapy Certification Act.

§ 90-270.60. Denial, revocation or suspension of certification.

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§§ 90-270.63, 90-270.64: Reserved for future codification purposes.

ARTICLE 18D.

Occupational Therapy.

§ 90-270.65. Title.

This Article shall be known as the "North Carolina Occupational Therapy Practice Act." (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

Editor's Note. Session Laws 1983 (Reg. Sess., 1984), c. 1073, s. 3 makes this Article effective September 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1973, s. 2, is a severability clause.

§ 90-270.66. Declaration of purpose.

The North Carolina Occupational Therapy Practice Act is enacted to safeguard the public health, safety and welfare, to protect the public from being harmed by unqualified persons, to assure the highest degree of professional care and conduct on the part of occupational therapists and occupational therapist assistants, to provide for the establishment of standards of education, and to insure the availability of occupational therapy services of high quality to persons in need of such services. It is the purpose of this act to provide for the regulation of persons offering occupational therapy services to the public. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.67. Definitions.

As used in this Article, unless the context clearly requires a different meaning:

(1) "Board" means the North Carolina Board of Occupational Therapy.

(2) "Occupational therapist" means an individual licensed in good standing to practice occupational therapy as defined in this Article.

(3) "Occupational therapist assistant" means an individual licensed in good standing to assist in the practice of occupational therapy under this Article, who performs activities commensurate with his education and training under the supervision of a licensed occupational therapist.

(4) "Occupational therapy" means a health care profession providing evaluation, treatment and consultation to help individuals achieve a maximum level of independence by developing skills and abilities interfered with by disease, emotional disorder, physical injury, the aging process, or impaired development. Occupational therapists use purposeful activities and specially designed prosthetic devices to reduce specific impairments and to help individuals achieve independence at home and in the work place.

(5) "Person" means any individual, partnership, unincorporated organization, or corporate body, except that only an individual may be licensed under this Article. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.68. Establishment of Board, terms of members, meetings, compensation.

The North Carolina Board of Occupational Therapy is created. The Board shall have six members. All members shall be appointed by the Governor and shall be residents of this State at the time of and during their appointment. Three members shall be occupational therapists and one shall be an occupational therapist assistant; and one shall be a physician licensed to practice medicine who specializes in orthopedic medicine; each of these members must have practiced, taught or engaged in research in occupational therapy for at least three of the five years immediately preceding his appointment. The remaining board member shall represent the public at large.

On or before October 1, 1984, the Governor shall appoint two occupational therapist members to serve a one-year term, one public member to serve a two-year term, one occupational therapist assistant to serve a three-year term, and one occupational therapist to serve a four-year term and the physician to serve a four-year term. Thereafter the term of office for all members shall be four years and only persons licensed under this Article shall be eligible for appointment to the occupational therapist and occupational therapist assistant positions on the Board. No member shall serve more than two complete consecutive terms.

Each year the Board shall meet and designate a chairman and a secretary-treasurer from among its members. The Board may hold additional meetings upon call of the chairman or any two board members. A majority of the Board membership shall constitute a quorum.

Members of the Board shall receive no compensation for their services, but shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.69. Powers and duties of the Board.

The Board shall have the following powers and duties:

(1) Examine and determine the qualifications and fitness of applicants for licensure to practice occupational therapy in this State;

(2) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article;

(3) Issue and renew, and deny, suspend, revoke or refuse to issue or renew any license under this Article;

(4) Adopt, amend, or repeal any reasonable rules or regulations necessary to carry out the purposes of this Article, including but not limited to rules establishing ethical standards of practice;

(5) Employ professional, clerical, investigative or special personnel necessary to carry out the provisions of this Article, and purchase or rent office space, equipment and supplies;

(6) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses;

(7) Conduct administrative hearings in accordance with Article 3 of Chapter 150A of the General Statutes when a "contested case" as defined in G.S. 150A-2(2) arises under this Article;

(8) Establish reasonable fees for applications for examination; initial, provisional, and renewal licenses; and other services provided by the Board;

(9) Submit an annual report to the Governor and General Assembly of all its official actions during the preceding year, together with any recommendations and findings regarding improvement of the profession of occupational therapy;

(10) Publish and make available upon request the licensure standards prescribed under this Article and all rules and regulations established by the Board;

(11) Approve educational curricula and field work experience accredited by the American Medical Association and American Occupational Therapy Association for persons seeking licensure under this Article. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.70. Requirements for licensure.

Any individual who desires to be licensed as an occupational therapist or occupational therapist assistant shall file a written application with the Board on forms provided by the Board, showing to the satisfaction of the Board that the applicant:

(1) Is of good moral character; and

(2) Has passed an examination by the Board as provided in this Article.

Applicants for licensure as an occupational therapist must also have successfully completed an accredited occupational therapy educational curriculum and supervised field work experience of at least six months' duration. Applicants for licensure as an occupational therapist assistant must also have successfully completed an accredited occupational therapy assistant educational curriculum and supervised field work experience of at least two months' duration. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.71. Examination.

(a) Applicants for licensure under this Article shall file an application at least 60 days before the date of an examination, upon a form and in such a manner as the Board shall prescribe. The application shall be accompanied by the fee prescribed under G.S. 90-270.77, and no portion of the fee shall be refundable. Any applicant who fails an examination may apply for reexamination upon payment of the fee prescribed under G.S. 90-270.77.

(b) Each applicant for licensure under this Article shall take a written examination on subjects including anatomy; physiology; kinesiology; psychology; sociology; human growth and development; neuroanatomy; neurophysiology; anthropology; occupational therapy theory and practice, including the applicant's professional skills and judgment in the utilization of occupational therapy techniques and methods; and such other related subjects as the Board may deem useful to determine the applicant's fitness to practice. The Board shall establish standards for acceptable performance on the examination.

(c) Applicants for licensure shall be examined at a time and place and under such supervision as the Board may determine. Examinations shall be given at least twice each year within this State.

(d) Applicants may obtain their examination scores and may review their papers in accordance with such rules as the Board may establish. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.72. Exemption from requirements.

(a) The Board shall waive the examination, education, and field work requirements of G.S. 90-270.70 and shall grant a license to any applicant who presents evidence satisfactory to the Board that he or she has been engaged in the practice of occupational therapy as an occupational therapist or occupational therapist assistant before September 1, 1984. Proof of such actual practice shall be presented to the Board as established by regulation. To qualify for exemption under this section, the applicant shall file an application for licensure no later than September 1, 1985.

(b) The Board may grant a license without examination to any applicant who presents proof satisfactory to the Board of current licensure as an occupational therapist or occupational therapist assistant in another state or the District of Columbia, provided the other jurisdiction's licensure standards are considered by the Board to be substantially equivalent to or higher than those prescribed in this Article. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.73. Issuance of license.

(a) The Board shall issue a license to any individual who meets the requirements of this Article upon payment of the license fee prescribed in G.S. 90-270.77.

(b) Any individual licensed as an occupational therapist under this Article may use the words "occupational therapist" and may use the letters "O.T." or "O.T.R./L." in connection with his name or place of business.

(c) Any individual licensed as an occupational therapist assistant under this Article may use the words "occupational therapist assistant" and may use the letter "O.T.A." or "C.O.T.A./L." in connection with his name or place of business. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.74. Provisional licenses.

The Board may grant a provisional license for a period not exceeding nine months to any individual who has successfully completed the educational and field work experience requirements and has made application to take the examination required under G.S. 90-270.70. A provisional license shall allow the individual to practice as an occupational therapist or occupational therapist assistant under the supervision of an occupational therapist licensed in this State and shall be valid until revoked by the Board. A provisional license shall not be issued to applicant who has failed the examination in this State or another jurisdiction. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.75. Renewal of license.

(a) Licenses issued under this Article shall be subject to annual renewal upon the payment of a renewal fee specified under G.S. 90-270.77 and compliance with this Article, and shall expire unless renewed in the manner prescribed by the Board. The Board may provide for the late renewal of a license upon the payment of a late fee in accordance with G.S. 90-270.77, but no such late renewal may be granted more than five years after a license expires.

(b) A suspended license is subject to expiration and may be renewed as provided in this section, but such renewal shall not entitle the licensee to engage in the licensed activity or in any other conduct or activity in violation of the order or judgment by which the license was suspended until the license is reinstated. If a license revoked on disciplinary grounds is reinstated, the licensee shall pay the renewal fee and any late fee that may be applicable. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.76. Suspension, revocation and refusal to renew license.

(a) The Board may deny or refuse to renew a license, may suspend or revoke a license, or may impose probationary conditions on a license if the licensee or applicant for licensure has engaged in any of the following conduct:

(1) Employment of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license, or the renewal thereof;

(2) Conviction of or a plea of guilty or nolo contendere to any crime involving moral turpitude;

(3) Adjudication of insanity or incompetency, until proof of recovery from the condition can be established;

(4) Engaging in any act or practice violative of any of the provisions of this Article or any rule or regulation adopted by the Board hereunder, or aiding, abetting or assisting any person in such a violation;

(5) Committing an act or acts of malpractice, gross negligence or incompetence in the practice of occupational therapy;

(6) Practicing as a licensed occupational therapist or occupational therapist assistant without a current license;

(7) Engaging in conduct that could result in harm or injury to the public.

(b) Such denial, refusal to renew, suspension, revocation or imposition of probationary conditions upon a license may be ordered by the Board after a hearing held in accordance with G.S. Chapter 150A and rules adopted by the Board. An application may be made to the Board for reinstatement of a revoked license if the revocation has been in effect for at least one year. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.77. Fees.

The Board shall adopt and publish, in the manner established by its rules and regulations, fees reasonably necessary to cover the cost of services rendered for the following purposes:

(1) For an initial application, a fee not to exceed ten dollars ($10.00);
(2) For examination, reexamination, or issuance of a license a fee not to exceed one hundred dollars ($100.00);
(3) For the renewal of a license, a fee not to exceed fifty dollars ($50.00);
(4) For the late renewal of a license, a fee not to exceed fifty dollars ($50.00);
(5) For a provisional license, a fee not to exceed thirty-five dollars ($35.00); and
(6) For copies of Board rules and licensure standards, charges not exceeding the actual cost of printing and mailing. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.78. False representation of license prohibited.

It is unlawful for any person who is not licensed in accordance with this Article or whose license has been suspended, revoked or not renewed by the Board to:

(1) Engage in the practice of occupational therapy;
(2) Orally, in writing, in print or by sign, or in any other manner, directly or by implication, represent that he is engaging in occupational therapy; or
(3) Use in connection with his name or place of business the words "occupational therapist" or "occupational therapist assistant"; or the letters "O.T.", "O.T.R./L.", "O.T.A.", or "C.O.T.A./L." or any other words, letters, abbreviations or insignia indicating or implying that the person is an occupational therapist or occupational therapist assistant. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.79. Violation a misdemeanor.

Any person who violates any provision of this Article shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned, or both, in the discretion of the court. Each act of such unlawful practice shall constitute a distinct and separate offense. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.80. Injunctions.

The Board may make application to any appropriate court for an order enjoining violations of this Article, and upon a showing by the Board that any person has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.81. Persons and practices not affected.

Nothing in this Article shall be construed to prevent or restrict:

(1) Any person registered, certified, credentialed, or licensed to engage in another professional or occupation or any person working under the supervision of a person registered, certified, credentialed, or licensed to engage in another profession or occupation in this State from performing work incidental to the practice of that profession or occupa-

tion as long as the person does not represent himself as an occupational therapist or occupational therapist assistant;

(2) Any person employed as an occupational therapist or occupational therapist assistant by the government of the United States, if he provides occupational therapy solely under the direction or control of the organization by which he is employed;

(3) Any person pursuing a course of study leading to a degree or certificate in occupational therapy at an accredited or approved educational program if such activities and services constitute a part of a supervised course of study and if the person is designated by a title which clearly indicates his status as a student or trainee;

(4) Any person fulfilling the supervised field work experience required for licensure under this Article if the person is designated by a title which clearly indicates his status as a student or trainee;

(5) Occupational therapists or occupational therapist assistants licensed in other jurisdictions who are teaching or participating in special occupational therapy education projects, demonstrations or courses in this State, provided their evaluation and treatment of patients is minimal. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

Article 23.

Right to Natural Death; Brain Death.

§ 90-323. Death; determination by physician.

CASE NOTES

Applied in State v. Hefler, 310 N.C. 135, 310 S.E.2d 310 (1984).

Chapter 91.

Pawnbrokers.

§ 91-2. License; business confined to municipalities.

Local Modification. — Dare County: 1983 (Reg. Sess., 1984), c. 968.

§ 91-3. Municipal authorities to grant and control license; bond.

Local Modification. — Dare County: 1983 (Reg. Sess., 1984), c. 968.

§ 91-4. Records to be kept.

Local Modification. — Dare County: 1983 (Reg. Sess., 1984), c. 968.

Chapter 93.

Public Accountants.

Sec.
93-2. Qualifications.
93-4. Use of title by firm.
93-5. Use of title by corporation.
93-7. Registration of accountants already practicing.
93-10. Persons certified in other states.

§ 93-2. Qualifications.

Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over 18 years of age and of good moral character, and who shall have received from the State Board of Certified Public Accountant Examiners a certificate of qualification admitting him to practice as a certified public accountant as hereinafter provided, or who is the holder of a valid and unrevoked certificate issued under the provisions of Chapter 157 of the Public Laws of 1913, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2; 1979, c. 750, s. 4.)

Editor's Note. — The above is set out to substitute reference to the State Board of Certified Public Accountant Examiners for reference to the State Board of Accountancy, pursuant to § 93-12.

§ 93-4. Use of title by firm.

It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Certified Public Accountant Examiners admitting him to practice as a certified public accountant; provided, however, that the Board may exempt those persons who do not actually practice in or reside in the State of North Carolina from registering and receiving a certificate of qualifications under this section. (1925, c. 261, s. 4; 1979, c. 750, s. 5.)

Editor's Note. — The above is set out to substitute reference to the State Board of Certified Public Accountant Examiners for reference to the State Board of Accountancy, pursuant to § 93-12.

§ 93-5. Use of title by corporation.

It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Certified Public Accountant Examiners admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)

Editor's Note. — The above is set out to substitute reference to the State Board of Certified Public Accountant Examiners for reference to the State Board of Accountancy, pursuant to § 93-12.

§ 93-7. Registration of accountants already practicing.

Any person, firm, copartnership, association or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, may, within six months thereafter, apply to the State Board of Certified Public Accountant Examiners for registration as a public accountant, and the State Board of Certified Public Accountant Examiners, upon the production of satisfactory evidence that such applicant was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina on March 10, 1925, shall register such person, firm, copartnership, association or corporation. Such registration shall be conclusive evidence of the right of such person, firm, copartnership, association or corporation to engage in the practice of public accounting in the State of North Carolina, but such registration shall not be construed in any way as indicating that the State of North Carolina or the State Board of Certified Public Accountant Examiners has approved the educational and professional experience and qualifications of the registrant. (1925, c. 261, s. 7.)

Editor's Note. — The above is set out to substitute reference to the State Board of Certified Public Accountant Examiners for reference to the State Board of Accountancy, pursuant to § 93-12.

§ 93-10. Persons certified in other states.

A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Certified Public Accountant Examiners and comply with its rules regarding such registration. (1925, c. 261, s. 10.)

Editor's Note. — The above is set out to substitute reference to the State Board of Certified Public Accountant Examiners for reference to the State Board of Accountancy, pursuant to § 93-12.

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

§ 93A-1. License required of real estate brokers and real estate salesmen.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

Chapter 95.

Department of Labor and Labor Regulations.

Article 1.

Department of Labor.

Sec.
95-2. (Effective July 1, 1985) Election of Commissioner; term; salary; vacancy.

Article 1.

Department of Labor.

§ 95-2. (Effective July 1, 1985) Election of Commissioner; term; salary; vacancy.

The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. The term of office of the Commissioner of Labor shall be four years, and the salary of the Commissioner of Labor shall be set by the General Assembly in the Current Operations Appropriations Act. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the City of Raleigh and shall be provided for as are other public offices of the State. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C. S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 5; 1967, c. 1130; c. 1237, s. 5; 1969, c. 1214, s. 5; 1971, c. 912, s. 5; 1973, c. 778, s. 5; 1975, 2nd Sess., c. 983, s. 20; 1977, c. 802, s. 42.11; 1983, c. 761, s. 207; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 2A.

Wage and Hour Act.

§ 95-25.2. Definitions.

CASE NOTES

The definition of "employer" in subsection (5) of this section is identical to the definition in the Equal Pay Act. In construing this definition, the court should keep in mind the remedial purposes of Title VII (42 U.S.C. § 2000) and the Equal Pay Act (29 U.S.C. § 203(d)). Crowder v. Fieldcrest Mills, Inc., 569 F. Supp. 825 (M.D.N.C. 1983).

ARTICLE 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

CASE NOTES

Applied in House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

CASE NOTES

Applied in McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

§ 95-137. Issuance of citations.

CASE NOTES

Constitutionality. — House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983), cert. denied, 310 N.C. 153, 311 S.E.2d 291 (1984).

For cases construing notice provision contained in the Federal Occupational Safety and Health Act of 1970 (29 U.S.C. § 659(a)), see House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983), cert. denied, 310 N.C. 153, 311 S.E.2d 291 (1984).

§ 95-141. Judicial review.

CASE NOTES

Cited in House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983).

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec.

96-3. (Effective July 1, 1985) Employment Security Commission.

96-4. Administration.

Article 2.

Unemployment Insurance Division.

Sec.

96-9. Contributions.

Article 1.

Employment Security Commission.

§ 96-1. Title.

Legal Periodicals. —

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

§ 96-2. Declaration of State public policy.

CASE NOTES

Design of Employment, etc. —

The Employment Security Act was designed to provide protection against economic insecurity due to unemployment and should be liberally construed in favor of applicants. Eason v. Gould, Inc., — N.C. App. —, 311 S.E.2d 372 (1984).

The Employment Security Act was not designed to provide the payment of benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be in a position to accept any employment if it were tendered to him, however capable and industrious such person may be. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

"Through No Fault of Their Own". —

For discussion of whether a person who loses his employment for health reasons has left involuntarily with good cause attributable to the employer, see Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

§ 96-3. (Effective July 1, 1985) Employment Security Commission.

(a) Organization. — There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment. Three members of the Commission shall be appointed by the Governor to serve for a term of two years. Three members shall be appointed to serve for a term of four years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four years each, thereafter, and the member of said Commission designated by the Governor as chairman shall serve at the pleasure of the Governor. Any member appointed to fill a vacancy occurring in any of the appointments made by the Governor prior to

the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions. — The Commission shall establish two coordinate divisions: the North Carolina State Employment Service Division, created pursuant to G.S. 96-20, and the Unemployment Insurance Division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except insofar as the Commission may find that such separation is impracticable. Notwithstanding any other provision of this Chapter, administrative organization of the agency shall be in accordance with that which the Commission finds most desirable in order to perform the duties and functions of the agency.

(c) Salaries. — The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the General Assembly in the Current Operations Appropriations Act; and the members of the Commission, other than the chairman, shall each receive the same amount per diem for their services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services as such, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum. — The chairman and three members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5; 1965, c. 795, s. 1; 1977, c. 727, s. 7; 1979, c. 660, s. 1; 1981, c. 354; 1983, c. 717, s. 19; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume and the 1983 Cumulative Supplement.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in subsection (c) of this section.

§ 96-4. Administration.

(e) Advisory Councils. — The Governor shall appoint local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and have such members representing the general public as the Governor may designate. Such councils shall aid the Commission in formulating policies and discussing problems related to the administration of this Chapter, and in assuring impartiality and freedom from political influence in the solution of such problems. Such local advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses.

(Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1; 1951, c. 332, ss. 1, 18; 1953, c. 401, ss. 1-4; 1955, c. 385, ss. 1, 2; c. 479; 1957, c. 1059, s. 1; 1969, c. 44, s. 63; c. 575, ss. 1, 2; 1971, c. 673, ss. 1, 2; 1977, c. 727, ss. 8-10; 1979, c. 660, s. 2; 1979, 2nd Sess., c. 1212, s. 2; 1981, c. 160, s. 1; 1983, c. 625, s. 16; 1983 (Reg. Sess., 1984), c. 995, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, in subsection (e), deleted "a State Advisory Council and" following "The Governor shall appoint" at the beginning of the first sentence, and deleted the last sentence, relating to the State Advisory Council.

CASE NOTES

When no exceptions are made to findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. Davis v. Corning Glass Works, 65 N.C. App. 379, 309 S.E.2d 258 (1983).

Applied in Sellers v. National Spinning Co., 64 N.C. App. 567, 307 S.E.2d 774 (1983); Patrick v. Cone Mills Corp., 64 N.C. App. 722, 308 S.E.2d 476 (1983); Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983); Gorski v. North Carolina Symphony Soc'y, Inc., — N.C. —, 314 S.E.2d 539 (1984).

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

Legal Periodicals. —

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984).

§ 96-9. Contributions.

(c) (1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall

be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss. 1-11.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subdivision (c)(1) of this section is set out above to correct an error in the 1983 Cumulative Supplement.

Effect of Amendments. —

The 1983 amendment, effective Aug. 1, 1983, added the last paragraph of subdivision (a)(5), added subdivision (b)(3)i, rewrote the first sentence of subdivision (c)(1), deleted a former second sentence of subdivision (c)(1), in subdivision (c)(2)a substituted "allocated to" for "charged against" in the first sentence and inserted the present second sentence, rewrote subdivision (c)(2)b, added the proviso at the end of the second sentence of subdivision (d)(2)a, deleted "charged" preceding "credited and maintained" in subdivision (d)(2)b, rewrote subdivision (d)(2)c, rewrote subdivision (f)(2), in subdivision (f)(4) inserted "as provided in subdivision (1) hereof," and added subsection (g).

§ 96-12. Benefits.

Legal Periodicals. —

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984).

§ 96-13. Benefit eligibility conditions.

CASE NOTES

The Employment Security Act was not designed to provide benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be

in a position to accept any employment if it were tendered to him, however capable and industrious such person may be. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

A person who must quit a job for health reasons but who is available for other employment is clearly not a person envisioned by this language. Both reason and justice demand that such a claimant receive unemployment benefits. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

For discussion of whether a person who loses his employment for health reasons has left involuntarily with good cause attributable to the employer, see Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984).

Cited in Gorski v. North Carolina Symphony Soc'y, Inc., — N.C. —, 314 S.E.2d 539 (1984).

§ 96-14. Disqualification for benefits.

Legal Periodicals. —

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

VI. Judicial Review.

I. GENERAL CONSIDERATION.

Design of Employment Security Law. — The Employment Security Act was not designed to provide the payment of benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be in a position to accept any employment if it were tendered to him, however capable and industrious such person may be. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

The Employment Security Act was designed to provide protection against economic insecurity due to unemployment and should be liberally construed in favor of applicants. Eason v. Gould, Inc., — N.C. App. —, 311 S.E.2d 372 (1984).

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984).

Applied in Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983).

Cited in Gorski v. North Carolina Symphony Soc'y, Inc., — N.C. —, 314 S.E.2d 539 (1984).

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

"Good Cause" Construed. — "Good cause," as used in subdivision (1) of this section connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. Sellers v. National Spinning Co., 64 N.C. App. 567, 307 S.E.2d 774 (1983), cert. denied, 62 N.C. App. 820, 310 S.E.2d 153, 310 N.C. 153, 311 S.E.2d 293 (1984).

"Voluntary". —

An employee has not left his job voluntarily when events beyond the employee's control or the wishes of the employer cause the termination. Eason v. Gould, Inc., — N.C. App. —, 311 S.E.2d 372 (1984).

A good cause within the meaning of subdivision (1) of this section includes a reaction to requests or policies of the employer which would be considered valid by reasonable minds. Eason v. Gould, Inc., — N.C. App. —, 311 S.E.2d 372 (1984).

Notice to Employer that Employee Is Leaving with Expectation of Later Returning. — Where an employee leaves employment because of a temporary disability with the expectation of later returning to work he is required to apply for a leave of absence, give a timely notice, or otherwise manifest an intention not to abandon the labor force. This is especially applicable where the leaving is an equivocal act, as where a pregnant woman leaves her employment and the leaving can be construed either as a temporary absence or an abandonment of the labor force. Sellers v. National Spinning Co., 64 N.C. App. 567, 307 S.E.2d 774 (1983); cert. denied, 62 N.C. App. 820, 310 S.E.2d 153, 310 N.C. 153, 311 S.E.2d 293 (1984).

A person who must quit a job for health reasons but who is available for other employment is clearly not a person envisioned by this language. Both reason and justice demand that such a claimant receive unemployment benefits. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

For discussion of whether a person who loses his employment for health reasons has left involuntarily with good cause attributable to the employer, see Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983).

III. MISCONDUCT.

The term "misconduct," etc. —

In accord with 2nd paragraph in 1983 Cum. Supp. See Miller v. Guilford County Schools, 62 N.C. App. 729, 303 S.E.2d 411, cert. denied, 309 N.C. App. 321, 307 S.E.2d 165 (1983).

Misconduct is conduct evincing a willful or wanton disregard for an employer's interest, as demonstrated by the following types of conduct: (1) deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee; (2) carelessness or negligence of such degree or recurrence that it manifests equal culpability, wrongful intent, or evil design, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. Douglas v. J.C. Penney Co., — N.C. App. —, 313 S.E.2d 176 (1984).

Inefficiency or unsatisfactory job performance does not amount to misconduct. Nor does violation of a work rule constitute misconduct if the evidence shows that the employee's actions were reasonable and taken with good cause, good cause being that deemed by reasonable men and women valid and not indicative of an unwillingness to work. Douglas v. J.C. Penney Co., — N.C. App. —, 313 S.E.2d 176 (1984).

An intent to violate a work rule is not equivalent to misconduct within the purview of subdivision (2) of this section as a matter of law. Kahl v. Smith Plumbing Co., — N.C. App. —, 314 S.E.2d 574 (1984).

Employee's grumbling and his statement that he intended in the future to violate a work rule did not rise to the level of willful or wanton disregard of the employer's standards such as to constitute misconduct connected with work. Kahl v. Smith Plumbing Co., — N.C. App. —, 314 S.E.2d 574 (1984).

VI. JUDICIAL REVIEW.

In considering an appeal from a decision of the Employment Security Commission, the reviewing court must (1) determine whether there was evidence before the Commission to support its findings of fact and (2) decide whether the facts found sustain the Commission's conclusions of law and its resulting decision. Miller v. Guilford County Schools, 64 N.C. App. 729, 303 S.E.2d 411, cert. denied, 309 N.C. 321, 307 S.E.2d 165 (1983).

Deliberate Violation of Attendance Rules. — Where prior to the claimant's going on leave, she was on probation due to absence from work and tardiness in reporting to work; the employer had a known, reasonable policy that provided that medical leaves of absence can be granted or extended only upon the request of the employee's physician and the claimant was aware of this policy; and when the claimant reported back to work at the usual time she did not present a doctor's excuse for the previous day's absence, or to extend the leave of absence, the Commission could reasonably conclude that the claimant deliberately violated her employer's attendance rules. Therefore, the Commission's findings supported its conclusion that she had been discharged for "misconduct connected with her work." Davis v. Corning Glass Works, 65 N.C. App. 379, 309 S.E.2d 258 (1983).

§ 96-15. Claims for benefits.

CASE NOTES

Scope of Superior Court's Jurisdiction. —

In accord with 2nd paragraph in original. See Gorski v. North Carolina Symphony Soc'y, Inc., 64 N.C. App. 649, 308 S.E.2d 460 (1983).

The scope of judicial review of appeals from decisions of the Employment Security Commission is a determination of whether the facts found by the commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. Phillips v. Kincaid Furn. Co., — N.C. App. —, 313 S.E.2d 19 (1984).

The superior court has no authority to make new findings on appeal, but is bound by all findings and conclusions properly made. Gorski v. North Carolina Symphony Soc'y, Inc., 64 N.C. App. 649, 308 S.E.2d 460 (1983).

Section 1A-1, Rule 6(e) does not apply to appeals from an Employment Security Commission adjudicator, so as to give the appealing party, in addition to the 10-day period prescribed by subdivision (b)(2) of this section, three additional days within which to file an appeal. Smith v. Daniels Int'l, 64 N.C. App. 381, 307 S.E.2d 434 (1983).

Applied in Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Patrick v. Cone Mills Corp., 64 N.C. App. 722, 308 S.E.2d 476 (1983); Douglas v. J.C. Penney Co., — N.C. App. —, 313 S.E.2d 176 (1984).

§ 96-17. Protection of rights and benefits; deductions for child support obligations.

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

Sec.
97-2. Definitions.
97-13. Exceptions from provisions of Article.
97-78. (Effective July 1, 1985) Salaries and expenses; secretary and other clerical assistance; annual report.

Article 1.

Workers' Compensation Act.

§ 97-1. Short title.

Legal Periodicals. —

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For comment discussing the North Carolina Workers' Compensation Act in light of Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982), see 19 Wake Forest L. Rev. 513 (1983).

CASE NOTES

Construction. —

In accord with 4th paragraph in original. See Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983), cert. denied, — N.C. —, 312 S.E.2d 652 (1984).

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984).

Effect of Certification of Ability to Work to Employment Security Commission. — Employee's certification of himself as able to work to the Employment Security Commission does not mean that he is estopped from recovering workers' compensation benefits. His statement to the Employment Security Commission was not conclusive evidence on the question of disability, and therefore, not binding upon the Industrial Commission. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984).

Applied in Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983); Wiggins v. Rufus Tart Trucking Co., 63 N.C. App. 542, 305 S.E.2d 749 (1983).

Cited in Mills v. Mills, — N.C. App. —, 314 S.E.2d 833 (1984).

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires —

(1) Employment. — The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which four or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of radiation, except agriculture and domestic services, unless 10 or more full-time nonseasonal agricultural workers are regularly employed by the employer and an individual sawmill and logging operator with less

than 10 employees, who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1; 1973, c. 521, ss. 1, 2; c. 763, ss. 1-3; c. 1291, s. 14; 1975, c. 266, s. 1; c. 284, ss. 2, 3; c. 288; c. 718, s. 3; c. 817, s. 1; 1977, c. 419; c. 893, s. 1; 1979, cc. 86, 374; c. 516, ss. 4, 5; c. 714, s. 3; 1981, c. 421, ss. 1, 2; 1983, c. 833; 1983 (Reg. Sess., 1984), c. 1042, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, inserted "unless 10 or more full-time nonseasonal agricultural workers are regularly employed by the employer" in subdivision (1).

Legal Periodicals. —

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983); Godley v. Hackney & Sons, 65 N.C. App. 155, 308 S.E.2d 492 (1983); Freeman v. SCM Corp., — N.C. App. —, 311 S.E.2d 75 (1984).

II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

A. Employment.

Right to Compensation, etc. —

Because the Act only applies where the employer-employee relationship exists, the question of whether it existed at the time of the accident is jurisdictional. Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983).

B. Employee.

1. In General.

Common-Law Tests Applicable. —

The statutory definition of employee adds nothing to the common-law meaning of the term. As a result, whether the employer-employee relationship existed at the time of the accident is to be determined by ordinary common-law tests. The plaintiff has the burden of proof on this issue. Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

When Industrial Commission's, etc. —

In accord with 4th paragraph in original. See Williams v. Hydro Print, Inc., 65 N.C. App. 1, 308 S.E.2d 478 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

B. Accident.

Degenerative disc condition which was a gradual deterioration occurring over years, is excluded from the definition of "accident." Griffitts v. Thomasville Furn. Co., 65 N.C. App. 369, 309 S.E.2d 277 (1983).

C. Arising Out of and in the Course of Employment.

1. In General.

"In the Course of" the Employment Construed. —

The phrase "in the course of employment" refers to "the time, place, and circumstances under which an accidental injury occurs . . ." Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

"Arising Out of" Defined. —

An injury is deemed to be "arising out of the employment" when there is a causal connection between the employment and the injury. Hensley v. Caswell Action Comm., 296 N.C. 527, 251 S.E.2d 399 (1979). This type of accident occurs when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

2. Origin and Cause of Accident.

a. Risks Incident to the Employment Generally.

The causative danger must be peculiar, etc. —

The causative danger must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

3. Time, Place and Circumstances of Accident.

a. Injuries While Acting for Benefit of Self or Third Person.

Activities which are undertaken for the personal comfort of the employee are considered part of the "circumstances" element of the course of employment. Spratt v. Duke Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983).

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment. Spratt v. Duke Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983).

5. Miscellaneous Illustrative Cases.

Injury during Regularly Scheduled Rest Break. — Plaintiff's injury arose out of and in the course of his employment, that is, had its origin in an employment-connected risk as opposed to one common to the public at large, where he was locked inside the plant yard which was enclosed with a high chain link fence with a large crowd of fellow employees as was customary during a regularly scheduled rest break, the railroad track over which he tripped and injured his knee was an integral part of the equipment of the plant, and it ran directly through the area in which he took his relaxation breaks, and permission from the plant supervisor was necessary in order for an employee to leave the plant premises during these scheduled rest breaks. Williams v. Hydro Print, Inc., 65 N.C. App. 1, 308 S.E.2d 478 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

D. Injury from Disease.

Phlebitis, Arthritis, and Severe Body Pain Compensable Where They Result from Primary Injury. — The complications of phlebitis, arthritis and severe body pain, whether the complications were considered subsequent injuries or diseases, were compensable under the act where they were the natural and unavoidable result of the primary injury to plaintiff's hip and upper leg. Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983), cert. denied, — N.C. —, 312 S.E.2d 652 (1984).

V. DISABILITY.

"Disability" Signifies, etc. —

In accord with 4th paragraph in original. See Fleming v. K-Mart Corp., — N.C. App. —, 313 S.E.2d 890 (1984).

Capacity to Earn Is Test of "Disability". —

As used in the Workers' Compensation Act, "disability" specifically relates to incapacity to earn wages. Fleming v. K-Mart Corp., — N.C. App. —, 313 S.E.2d 890 (1984).

VIII. WIDOW; WIDOWER.

To qualify as the "widow" under the Act, surviving wife must have been living with husband at time of death; if not, it must have been for justifiable cause or by reason of his desertion at such time. Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983).

§ 97-3. Presumption that all employers and employees have come under provisions of Article.

CASE NOTES

Stated in Wiggins v. Rufus Tart Trucking Co., 63 N.C. App. 542, 305 S.E.2d 749 (1983); Poythress v. Libbey-Owens Ford Co., — N.C. App. —, 313 S.E.2d 893 (1984).

§ 97-6.1. Protection of claimants from discharge or demotion by employers.

Legal Periodicals. —
For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

Prerequisites to Cause of Action under This Section. — To allege a cause of action under this section, plaintiff must have been demoted or discharged and such demotion or discharge must have occurred because plaintiff, in good faith, instituted or caused to be instituted a proceeding under the North Carolina Workers' Compensation Act, or testified or is about to testify in any such proceeding. Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983).

§ 97-10.1. Other rights and remedies against employer excluded.

CASE NOTES

Separate Tort Action against Employer Is Barred. — When plaintiff has been compensated by the payment of workers' compensation benefits, she cannot now maintain a separate action against her employer for additional compensation. Having already selected one avenue of recovery, plaintiff is precluded from maintaining a tort action. Freeman v. SCM Corp., — N.C. App. —, 311 S.E.2d 75 (1984).

Gross Negligence. — Even though plaintiff may have been injured by defendant's gross negligence, rather than by accident, where she has been compensated by workers' compensation benefits, she is still precluded from maintaining an action against defendant. Freeman v. SCM Corp., — N.C. App. —, 311 S.E.2d 75 (1984).

Applied in Horne v. General Elec. Co., 716 F.2d 253 (4th Cir. 1983); Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983).

Stated in Poythress v. Libbey-Owens Ford Co., — N.C. App. —, 313 S.E.2d 893 (1984).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

CASE NOTES

Effect of Contributory Negligence of Employer. — When the employee or his estate has been satisfied, and the employer seeks to recover the amount paid by him, from a third party, such third party may raise as a defense that the employer's negligence caused the employee's death. Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 305 S.E.2d 528 (1983).

If the defense of contributory negligence of the employer be not recognized, an employer could by his own negligence participate in the killing or injuring of the workman, pay for it, and then wash his hands of his own wrong merely because he brought a suit against the third party, who also contributed to the injury or death. Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 305 S.E.2d 528 (1983).

Cited in Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

Applied in Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182 (1983).

§ 97-13. Exceptions from provisions of Article.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Four Employees. — This Article shall not apply to casual employees, farm laborers when fewer than 10 full-time nonseasonal farm laborers are regularly employed by the same employer, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than four employees in the same business within this State, except that any employer without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workers' compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this Article from the effective date of said policy and his employees shall be so bound unless waived as provided in this Article; provided however, that this Article shall apply to all employers of one or more employees who are employed in activities which involve the use or presence of radiation.

(1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543; 1945, c. 766; 1957, c. 349, s. 10; c. 809; 1967, c. 996, s. 13; 1971, c. 284, s. 2; c. 1176; 1975, c. 718, s. 3; 1979, c. 247, s. 1; c. 714, s. 2; 1981, c. 378, s. 1; 1983 (Reg. Sess., 1984), c. 1042, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, inserted "when fewer than 10 full-time nonseasonal farm laborers are regularly employed by the same employer" in subsection (b).

CASE NOTES

I. IN GENERAL.

A self-insured employer is presumptively subjected to the provisions of the Act only for the life of the policy. Once the policy ends, this presumption ends. Wiggins v. Rufus Tart Trucking Co., 63 N.C. App. 542, 305 S.E.2d 749 (1983).

Cited in Hicks v. Brown Shoe Co., 64 N.C. App. 144, 306 S.E.2d 543 (1983).

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

CASE NOTES

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 97-22. Notice of accident to employer.

CASE NOTES

Cited in Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983).

§ 97-24. Right to compensation barred after two years; destruction of records.

CASE NOTES

Timely filing of a claim for compensation is a condition precedent to the right to compensation. Under this construction, failure to file a claim in a timely fashion works a jurisdictional bar to the right to receive compensation. The general rule is that a jurisdictional bar cannot be overcome by consent of the parties, waiver or estoppel. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983).

Prolonged Reliance on Employer's Promise to Take Care of Injury. — While plaintiff's reliance on defendant's promise to "take care of [his injury]" may have been reasonable in light of the circumstances at the time, the reasonableness of this reliance becomes suspect after nine years pass from the time when the promise was made with no indication that the promise will be honored. This alone would be enough to dissipate the effect of the alleged misrepresentation by defendant. These facts do not support the conclusion that defendant was equitably estopped from challenging the commission's jurisdiction to hear plaintiff's claim. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983).

§ 97-29. Compensation rates for total incapacity.

CASE NOTES

Applied in Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983); Ballenger v. Burris Indus., Inc., — N.C. App. —, 311 S.E.2d 881 (1984).

Cited in Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Fleming v. K-Mart Corp., — N.C. App. —, 313 S.E.2d 890 (1984).

§ 97-30. Partial incapacity.

CASE NOTES

Applied in Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983).

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983).

§ 97-31. Schedule of injuries; rate and period of compensation.

Legal Periodicals. —
For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

Subdivision (22) of this section applies only to serious bodily disfigurements which are not accompanied by any other disability which would already have been compensated for under another provision of the Workers' Compensation Act. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

Deductions from Gross Income, etc. —
One who is so disfigured as to be considered "repulsive" to others is less likely to be hired and thus is hampered or handicapped in his earning or securing employment. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

To warrant compensation for disfigurement it must be so permanent and serious that it, in some manner, hampers or handicaps the person in his earning or in securing employment, or it must be such as to make the person repulsive to other people. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

There is a serious disfigurement in law, etc. —
In accord with original. See Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983); Locklear v. Canal Wood Corp., 63 N.C. App. 185, 303 S.E.2d 825 (1983).

Compensation of Disfigurement, etc. —
Natural physical handicap resulting from the disfigurement, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment are factors to be used in arriving at the diminution of earning power — the amount of an award. It follows, however, that these same factors are to be used as well to determine if any award is to be made, that is, whether the disfigurement is in fact serious and thus compensable under subdivision (22) of this section because it is such as to give rise to the presumption that the worker has suffered a diminution of his future earning power. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

Applied in Davis v. Edgecomb Metals Co., 63 N.C. App. 48, 303 S.E.2d 612 (1983); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983).

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Fleming v. K-Mart Corp., — N.C. App. —, 313 S.E.2d 890 (1984).

§ 97-33. Prorating in event of earlier disability or injury.

CASE NOTES

Compensation for Separate and Distinct Injuries. — Under this section, it was proper to compensate employee for a 20 percent disability of the back when he has previously been compensated by the same employer for a 15 percent disability due to a prior injury, where the second injury was separate and distinct from the first injury. Bailey v. Smoky Mt. Enters., Inc., 65 N.C. App. 134, 308 S.E.2d 489 (1983).

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983).

§ 97-34. Employee receiving an injury when being compensated for former injury.

CASE NOTES

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983).

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

CASE NOTES

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983).

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.

Legal Periodicals. —
For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

Applied in Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

CASE NOTES

Applied in Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983).

§ 97-42. Deduction of payments.

CASE NOTES

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983).

§ 97-47. Change of condition; modification of award.

CASE NOTES

Time limit in this section has been construed to be a statute of limitations and not a condition precedent to jurisdiction. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983).

Applied in Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983); Burrow v. Hanes Hosiery, Inc., — N.C. App. —, 311 S.E.2d 30 (1984).

Cited in Hogan v. Cone Mills Corp., — N.C. App. —, 305 S.E.2d 213 (1983).

§ 97-52. Occupational disease made compensable; "accident" defined.

Legal Periodicals. —

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

CASE NOTES

Degenerative disc condition which was a gradual deterioration occurring over years, is excluded from the definition of "accident." Griffitts v. Thomasville Furn. Co., 65 N.C. App. 369, 309 S.E.2d 277 (1983).

§ 97-53. Occupational diseases enumerated; when due to exposure of chemicals.

Legal Periodicals. —

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

CASE NOTES

When Disease "Characteristic" of Profession. — Under subdivision (13), a disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

"Peculiar to the occupation" as used in subdivision (13) means that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations and is in excess of that attending employment in general. Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

There must be a proof of causation between the injury and the employment. Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

When Illness Compensable, etc. —

An injury resulting from an occupational disease is only compensable when it leads to disablement, until that time the employee has no cause of action, and the employer has no liability. Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983).

Applicability of Amended Subdivision (13). —

Subdivision (13) of this section applies to all claims for disablement where the disability occurs after the effective date of the statute, July 1, 1971. Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983).

What Plaintiff Must Show under Subdivision (13). —

The right to compensation for a disease caused in part by occupational factors and in part by nonoccupational factors depends on proving: (1) that the occupation in question exposed the worker to a greater risk of contracting the disease than members of the public generally, and (2) that the worker's exposure significantly contributed to or was a significant causal factor in the disease's development. Mills v. Mills, — N.C. App. —, 314 S.E.2d 833 (1984).

Degenerative disc condition which is not shown to be "characteristic of and peculiar to" plaintiff's employment is not an occupational disease, and there can be no compensation without a connection between the disease and the employment. Griffitts v. Thomasville Furn. Co., 65 N.C. App. 369, 309 S.E.2d 277 (1983).

Chronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other nonwork-related factors also make significant contributions, or were significant causal factors. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

An employee who suffers from chronic obstructive pulmonary disease is entitled to findings of fact and conclusions of law that said disease is an occupational disease pursuant to subdivision (13) of this section, if it is shown by competent evidence that occupational exposure to a hazard known to cause the disease, such as cotton dust, significantly contributed to the causation or development of the disease. "Significant" means having or likely to have influence or effect; deserving to be considered; important, weighty, notable. Swink v. Cone Mills, Inc., 65 N.C. App. 397, 309 S.E.2d 271 (1983).

Proof of Chronic Obstructive Pulmonary Disease as Occupational. — A claimant under the workers' compensation law is not required to establish work-related byssinosis as a causal element of his or her chronic obstructive pulmonary disease in order to prove the existence of an occupational disease within the meaning of subdivision (13) of this section. Rather, he or she needs only to establish the existence of chronic obstructive pulmonary disease and to establish that exposure to cotton dust in the work environment significantly contributed to, or was a significant causal factor in the development of the disease. Clark v. American & Efird Mills, — N.C. App. —, 311 S.E.2d 624 (1984).

Findings Required Where Disease Concluded Not to Be Occupational. — Where plaintiff has established the existence of chronic obstructive pulmonary disease with chronic bronchitis as the only element thereof, in order to conclude that plaintiff did not have an occupational disease within the meaning of subdivision (13) of this section the Commission would have to make findings, supported by competent record evidence, that plaintiff's exposure to cotton dust was neither a significant contribution to nor a significant causal factor in the development of her disease. Clark v. American & Efird Mills, — N.C. App. —, 311 S.E.2d 624 (1984).

Although the Industrial Commission made no findings regarding the significance of plaintiff's exposure to cotton dust in relation to the development of his lung disease, an award of workers' compensation would nevertheless be proper if the evidence supported a conclusion that occupational exposure was a significant contributing or causal factor in the development of plaintiff's lung disease. Mills v. Mills, — N.C. App. —, 314 S.E.2d 833 (1984).

Ninety decibels is generally considered a threshold of safe noise under federal and state occupational health and safety standards. (See generally Occupational Noise Exposure; Hearing Conservation Amendment, 46 Fed. Reg. 4077-78, 4087-96 (1981)). Under such noise standards many employers are required to maintain a continuing effective hearing conservation program for employees exposed to occupational noise levels of 85 decibels or more. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

Burden of Proving Hearing Loss. —

It is unreasonable to assume that the legislature intended an employee to bear the burden of making noise-level measurements during his employment in order to lay the groundwork for

a workers' compensation claim. Such an interpretation of subdivision (28) of this section would make it virtually impossible for an employee to successfully bring suit for compensation for a hearing loss, due to the difficulty he would encounter in attempting to make measurements of sound on his employer's premises. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

To establish a prima facie case under subdivision (28) of this section a plaintiff must prove: (1) loss of hearing in both ears which was (2) caused by harmful noise in his work environment. Upon so doing, the burden of proof shifts to the employer. If the employer then proves that the sound which caused plaintiff's hearing loss was of an intensity of less than 90 decibels, plaintiff cannot recover. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

In seeking to recover workers' compensation for occupational loss of hearing, an employee does not have the burden of proving as part of his prima facie case that the workplace sound which caused his hearing loss was of intensity of 90 decibels, A scale, or more. Rather, proof that the sound causing plaintiff's injury was of intensity less than 90 decibels is an affirmative defense available to the employer. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

No presumption arises under subdivision (28) of this section if the noise intensity level is 90 decibels or greater. Claimant must still prove a loss of hearing caused by harmful noise in the employment. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

A construction of subdivision (28) which defeats its purpose would be irrational and will not be adopted by the Supreme Court. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

Applied in May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983); Caulder v. Waverly Mills, — N.C. App. —, 314 S.E.2d 4 (1984).

§ 97-54. "Disablement" defined.

Legal Periodicals. — For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

CASE NOTES

Two-prong test is used to determine when running of claim period is triggered: (1) the time at which employee is disabled within the meaning of this section by his inability to work and (2) the time at which employee is informed of his disease by competent medical authority. Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983).

"Any other employment" construed. — This section clearly states the disablement begins when a claimant is incapacitated because of asbestosis or silicosis from earning in the same or any other employment the wages he earned at the time of his last injurious exposure to silicosis or asbestosis. It simply does not require that the "any other employment" be a "dusty" trade. Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983).

Applied in May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983).

§ 97-55. "Disability" defined.

Legal Periodicals. — For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

CASE NOTES

Applied in May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983).

§ 97-57. Employer liable.

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.

CASE NOTES

When subsections (b) and (c) of this section are interpreted in pari materia they require an employee who seeks to recover for disability resulting from an occupational disease to give notice or file a claim within two years of the time when he is first informed by competent medical authority of the nature and work-related cause of the disease. Lawson v. Cone Mills Corp., — N.C. App. —, 315 S.E.2d 103 (1984).

The two-year time limit, etc. —

In accord with 1st paragraph in 1983 Cumulative Supplement. See Lawson v. Cone Mills Corp., — N.C. App. —, 315 S.E.2d 103 (1984).

The two-year time limit under subsection (c) of this section for filing claims with the Industrial Commission is a condition precedent with which a claimant must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. The burden is on the plaintiff to establish that the claim was timely filed, and a failure to do so creates a jurisdictional bar to the claim. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

Two factors trigger the onset, etc. —

The two-year period within which claims for benefits for an occupational disease must be filed under subsection (c) of this section begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and the employee is informed by competent medical authority of the nature and work related cause of the disease. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

The two-year time limitation for filing claims does not begin to run anew when an employee's condition changes from permanent partial disability to permanent total disability. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

Had the legislature intended that only total permanent disability or disablement trigger the two-year limitation on claims or that a change in an employee's condition from permanent partial disability to permanent total disability would begin the two-year limitation period anew, the legislature would have said so in plain language. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

An employee must be informed clearly, simply and directly that he has an occupational disease and that the illness is work-related to trigger the running of the two-year period set forth in this section. Lawson v. Cone Mills Corp., — N.C. App. —, 315 S.E.2d 103 (1984).

The employee is required to file but a single claim, and the amount of compensation payable is predicated on the extent of the disability resulting from the accident or occupational disease. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

An accident or occupational disease resulting in compensable injuries to an employee gives rise to only one right of action or claim. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

Judicial Review. — Except as to questions of jurisdiction, findings of fact by the Industrial Commission are conclusive on appeal when

supported by competent evidence even though there is evidence to support contrary findings. Findings of jurisdictional fact by the Industrial Commission, however, are not conclusive upon appeal even though supported by evidence in the record. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

When a defendant employer challenges the jurisdiction of the Industrial Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, — N.C. —, 311 S.E.2d 590 (1984).

Applied in May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983).

Cited in Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983).

§ 97-59. Employer to pay for treatment.

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

CASE NOTES

Cited in Dean v. Cone Mills Corp., — N.C. App. —, 313 S.E.2d 11 (1984).

§ 97-78. (Effective July 1, 1985) Salaries and expenses; secretary and other clerical assistance; annual report.

(a) The salaries of the chairman and each of the other commissioners shall be fixed by the General Assembly in the Current Operations Appropriations Act.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and who shall be subject to the State Personnel System and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission, and who may be removed at the will of the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be certified by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the General Appropriation Act as made to other departments, commissions and agencies of the State government.

(e) The Commission shall publish annually for free distribution a report of the administration of this Article, together with such recommendations as the Commission deems advisable. (1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2; 1947, c. 823; 1957, c. 541, s. 6; 1971, c. 527, s. 1; c. 1147, s. 1; 1983, c. 717, s. 20; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume and the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in subsection (a) of this section.

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

§ 97-84. Determination of disputes by Commission or deputy.

CASE NOTES

Findings and Conclusions outside Scope of Hearing Are Improper. — Where the full Commission limited the initial hearing to defendant's motion to dismiss for lack of jurisdiction, given the limited scope of the hearing, it was patently improper for the deputy commissioner to find and conclude that plaintiff had suffered an injury arising from his employment with defendant and it was similarly improper for the full Commission, on appeal from the opinion and award of the deputy commissioner, to find and conclude that plaintiff had a compensable injury, regardless of its ruling with respect to jurisdiction. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983).

§ 97-85. Review of award.

CASE NOTES

Plenary Powers of Commission. — In accord with 1983 Cum. Supp. See Pollard v. Krispy Waffle # 1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

Power to Modify, etc. —

In accord with 3rd paragraph in original. See Pollard v. Krispy Waffle # 1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

The power to review and reconsider evidence and amend awards carries with it the power to modify or strike out findings of fact and conclusions made by the deputy commissioner or hearing commissioner, even though no exception has been made by the parties. Nash v. Conrad Indus., Inc., 62 N.C. App. 612, 303 S.E.2d 373, aff'd, 309 N.C. 629, 308 S.E.2d 334 (1983).

Full Commission Not Bound, etc. —

In accord with 1983 Cum. Supp. See Pollard v. Krispy Waffle # 1, 63 N.C. App. 354, 304 S.E.2d 762 (1983); Godley v. Hackney & Sons, 65 N.C. App. 155, 308 S.E.2d 492 (1983).

The hearing officer is the best judge of the credibility of witnesses because he is a firsthand observer of witnesses whose testimony he must weigh and accept or reject. However, the full Commission has the power to review determinations made by deputy commissioners on the credibility of witnesses. Pollard v. Krispy Waffle # 1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

Applied in Nash v. Conrad Indus., Inc., 309 N.C. 629, 308 S.E.2d 334 (1983).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

CASE NOTES

Scope of Review. —

In accord with 3rd paragraph in original. See Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

In accord with 12th paragraph in original. See Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983), cert. denied, — N.C. —, 312 S.E.2d 652 (1984).

In accord with 18th paragraph in original. See Pollard v. Krispy Waffle # 1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

The scope of review of the opinion and award of the full Commission is to determine whether there is evidence in the record to support the Commission's findings. The findings are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported a finding to the contrary. Pollard v. Krispy Waffle # 1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

When reviewing an appeal from an award of the full Commission the appellate court does not retry the facts, but, instead, determines whether there was any competent evidence before the Commission to support its findings of fact. Bailey v. Smoky Mt. Enters., Inc., 65 N.C. App. 134, 308 S.E.2d 489 (1983).

The Commission's findings of fact are conclusive on appeal if they are supported by competent evidence even though there is evidence to the contrary. Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983).

The Court of Appeals' scope of review upon appeal from an award of the Industrial Commission is limited to determining: (1) whether there was competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions. Mills v. Mills, — N.C. App. —, 314 S.E.2d 833 (1984).

Findings as to Whether Accident, etc. —

In accord with 4th paragraph in original. See Williams v. Hydro Print, Inc., 65 N.C. App. 1, 308 S.E.2d 478 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984); Spratt v. Duke Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983).

Commission Sole Judge, etc. —

The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Thus, the Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, — N.C. —, 312 S.E.2d 651 (1984).

Findings of Fact of Industrial Commission Are Conclusive. —

In accord with 2nd paragraph in original. See Bailey v. Smoky Mt. Enters., Inc., 65 N.C. App. 134, 308 S.E.2d 489 (1983).

In accord with 7th paragraph in original. See Bailey v. Smoky Mt. Enters., Inc., 65 N.C. App. 134, 308 S.E.2d 489 (1983).

Jurisdictional Facts Not Conclusive on Appeal. —

Ordinarily, the findings of fact of the Commission are binding on appeal if supported by any competent evidence. However, where a party challenges the jurisdiction of the Commission, the findings of fact are not conclusive and the reviewing court may consider all of the evidence in the record and make its own findings of fact. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983).

Patent Error of Law Must Be Shown. —

Under this section and case law, it is axiomatic that an opinion and award entered by the Industrial Commission will not be disturbed on appeal unless a patent error of law exists therein. Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983).

Remand Where Facts Found under Misapprehension of Law. —

When facts are found or the Industrial Commission fails to find facts under a misapprehension of the law, a remand may be necessary so that the evidence may be considered in its true legal light; the proper procedure on appeal is to remand a case when the Commission's findings of fact are insufficient to determine the rights of parties upon a claim for compensation. Mills v. Mills, — N.C. App. —, 314 S.E.2d 833 (1984).

Applied in Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983).

Cited in Chapman v. Southern Import Co., 63 N.C. App. 194, 303 S.E.2d 824 (1983).

§ 97-86.2. Interest on awards after hearing.

CASE NOTES

Applied in Hicks v. Brown Shoe Co., 64 N.C. App. 144, 306 S.E.2d 543 (1983).

Cited in Myers v. Department of Crime Control & Pub. Safety, — N.C. App. —, 313 S.E.2d 276 (1984).

§ 97-88.1. Attorney's fees at original hearing.

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

Chapter 99B.

Products Liability.

§ 99B-1. Definitions.

CASE NOTES

Applied in Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40 (1983).

§ 99B-2. Liability of seller and manufacturer.

Liability under Crashworthiness Theory, etc. —

Under the law of North Carolina, an automobile manufacturer would not be held liable for defects in the design and manufacture of a vehicle which neither caused nor contributed to the cause of a collision, but served to exacerbate injuries sustained thereafter. Wilson v. Ford Motor Co., 656 F.2d 960 (4th Cir. 1981).

Where 1964 Volkswagen occupied by decedents and designed, manufactured and distributed by VW, burst into flames due to an allegedly defective gas tank when it was struck by a 1972 Dodge being operated on the wrong side of the highway, and it was not alleged that the defective gas tank caused the collision, the district court erred in denying VW's motions for dismissal and for summary judgment in a suit to recover damages for the wrongful deaths of decedents as a result of the alleged failure of VW to design a crashworthy vehicle. Martin v. Volkswagen of Am., Inc., 707 F.2d 823 (4th Cir. 1983).

§ 99B-4. Injured parties' knowledge or reasonable care.

CASE NOTES

The manufacturer has a duty to warn of known dangers which can be encountered during foreseeable use of the product. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

Failure to adequately warn of dangerous propensities of a product may underlie a claim of breach of the implied warranty of merchantability. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

This section codifies a form of contributory negligence. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

Defense of Contributory Negligence, etc. —

In accord with 1983 Cum. Supp. See Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 719 (1983).

Failure to Follow Instructions. — Where plaintiff would not have been burned but for her failure to follow express instructions concerning a safety precaution, and the instructions on the product's label expressly warned of the burn potential, plaintiff's omission was the proximate cause of the very injury she suffered. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

Applied in Oates v. Jag, Inc., — N.C. App. —, 311 S.E.2d 369 (1984).

Chapter 104.

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Chapter 104E.

North Carolina Radiation Protection Act.

§ 104E-6.2. Local ordinances prohibiting low-level radioactive waste facilities invalid; petition to establish facility.

Legal Periodicals. — For comment on North Carolina's 1981 Waste Management Act, see 5 Camp. L. Rev. 337 (1983).

Chapter 105.

Taxation.

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105-151.13. Credit for conservation tillage equipment.

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105-164.16. Taxes due monthly; reports and payment of tax.

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105-259. Secrecy required of officials; penalty for violation.

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Property Subject to Taxation.

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Article 26.

Collection and Foreclosure of Taxes.

105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.
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SUBCHAPTER V. GASOLINE TAX.

Article 36.

Gasoline Tax.

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Sec.

105-449.01. [Repealed.]

Article 36A.

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105-449.24. Exemptions, rebates and refunds.
105-449.36. [Repealed.]

Article 36B.

Tax on Carriers Using Fuel Purchased Outside State.

105-449.55. Commissioner of Motor Vehicles to aid in enforcing Article.
105-449.56. Enforcement powers of weigh station officers of Motor Vehicles Division.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

Article 39.

Local Government Sales and Use Tax.

105-467. Sales tax imposed; limited to items on which the State now imposes a three percent sales tax.

Article 41.

Alternative Local Government Sales and Use Taxes.

105-494. Use of additional tax revenue by counties and municipalities.

SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of Subchapter.

The title of this Subchapter shall be "The Revenue Act." The purpose of this Subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and State of North Carolina during the next biennium and each biennium thereafter, and the provisions of this Subchapter shall be and remain in full force and effect until changed by law. It is the policy of this State that as many State taxes as possible be structured so that they are deductible for federal income tax purposes under the Internal Revenue Code. (1939, c. 158, ss. A, B; 1941, c. 50, s. 1; 1983 (Reg. Sess., 1984), c. 1097, s. 1.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, added the last sentence.

Article 1.

Schedule A. Inheritance Tax.

§ 105-2. General provisions.

A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

(1) When the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State, or when the transfer is made pursuant to a final judgment entered in a proceeding to caveat a will executed by any person dying seized of the property while a resident of this State.

(2) When the transfer is by will or intestate laws of this or any other state of real property or goods, wares, and merchandise within this State, or of any property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has a taxing jurisdiction, including State and municipal bonds, and the decedent was a resident of the State at the time of death; when the transfer is of real property or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, and the decedent was a nonresident of the State at the time of death.

(3) When the transfer of property made by a resident, or nonresident, is of real property within this State, or of goods, wares and merchandise within this State, or of any other property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has taxing jurisdiction, including State and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (i) the possession or enjoyment of, or the income from, the property or (ii) the right to designate the persons who shall possess or enjoy the property or the income therefrom. The aggregate value exceeding ten thousand dollars ($10,000) of transfers to any one donee within a tax year by deed, grant, bargain, sale, gift, or combination thereof, made within three years prior to the death of the grantor, vendor, or donor, without an adequate valuable consideration, shall be presumed, subject to rebuttal, to have been made in contemplation of death within the meaning of this section; the first ten thousand dollars ($10,000) in value shall be deemed not made in contemplation of death.

(4) When any person or corporation comes into possession or enjoyment, by a transfer from a resident, or from a nonresident decedent when such nonresident decedent's property consists of real property within this State or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by any instrument taking effect after March 24, 1939.

(5) a. For purposes of this Article, the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that:

1. A power to consume, invade or appropriate property for the benefit of the decedent which is limited by an ascertainable

standard relating to the health, education, support or maintenance of the decedent shall not be deemed a general power of appointment.

2. A power of appointment which is exercisable by the decedent only in conjunction with another person:
   I. If the power is not exercisable by the decedent except in conjunction with the creator of the power, such power shall not be deemed a general power of appointment.
   II. If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent, such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.
   III. If (after the application of clauses I and II) the power is a general power of appointment and is exercisable in favor of such other person, such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.
   IV. For purposes of clauses II and III, a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

b. Whenever any person shall have a general power of appointment with respect to any interest in property, such person shall, for the purposes of this Article, be deemed the owner of such interest and accordingly:
   1. If in connection with any transfer of property taxable under this Article the transferor shall give to any person a general power of appointment with respect to any interest in such property, the transferor shall be deemed to have given such interest in such property to such person.
   2. If any person holding a general power of appointment with respect to any interest in property shall exercise such power in favor of any other person or persons, either by will or by an appointment made in contemplation of the death of such person, or by an appointment intended to take effect in possession or enjoyment at or after such death, he shall be deemed to have made a transfer of such interest to such person or persons.
   3. If any person holding a general power of appointment with respect to any interest in property shall relinquish such power by any action taken in contemplation of death or intended to take effect at or after his death, or shall die without fully exercising such power, he shall be deemed, to the extent of such relinquishment or nonexercise, to have made a transfer of such interest to the person or persons who shall benefit thereby.

(6) Neither the exercise nor the relinquishment of a special power of appointment (which shall mean any power other than a general power) with respect to an interest in property shall be deemed to constitute a transfer of such interest within the meaning of this Article. If in connection with any transfer taxable under this Article the transferor shall give to any person a special power of appointment with respect to any interest in property, he shall be deemed, for the purpose of computing the tax applicable thereto, to have given such interest in equal shares to those persons, not more than two, among the possible appointees and takers in default of appointment whom the transferor's executor or administrator may designate as transferees in the inheritance tax return, except that:

a. If a gift tax return is filed with respect to such transfer, the persons designated therein shall also be designated in the inheritance tax return, and

b. The tax shall be computed according to the relationship of the donee of the power to the persons designated if the possible appointees and takers in default of appointment include any persons more closely related to the donee of the power than to the donor, and if such computation would produce a higher tax.

(7) Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable on one half of the value of such property.

(7a) When a husband and wife hold funds in a joint deposit account as joint tenants with the right of survivorship or own corporate stock or investment securities as joint tenants with the right of survivorship, the surviving spouse is taxable on no more than one-half of the amount in the joint deposit account or one-half of the amount of the corporate stock or investment securities. The surviving spouse may be taxable on less than one-half of the amount in the deposit account or the amount of the corporate stock or investment securities if, pursuant to subdivision (9), the surviving spouse can establish that he or she provided over one-half of the funds in the account or over one-half of the funds or property used to acquire the corporate stock or investment securities.

(8) Where the proceeds of life insurance policies are payable as provided in G.S. 105-13.

(9) Whenever any person or corporation comes into possession or enjoyment of any real or personal property, including bonds of the United States and bonds of a state or subdivision or agency thereof, at or after the death of an individual and by reason of said individual's having entered into a contract or other arrangement with the United States, a state or any person or corporation to pay, transfer or deliver said real or personal property, including bonds of the United States and bonds of a state, to the person or corporation receiving the same, whether said person or corporation is named in the contract or other arrangement or not: Provided, that no tax shall be due or collected on that portion of the real or personal property received under the conditions outlined herein which the person or corporation receiving the same purchased or otherwise acquired by funds or property of the person or corporation receiving the same, or had acquired by a completed inter vivos gift.

Nothing in subdivision (9) shall apply to the proceeds of life insurance policies.

However, nothing in this Article shall be construed as imposing a tax upon any transfer of intangibles not having a commercial or business situs in this

State, by a person, or by reason of the death of a person, who was not a resident of this State at the time of his death, and, if held or transferred in trust, such intangibles shall not be deemed to have a commercial or business situs in this State merely because the trustee is a resident or, if a corporation, is doing business in this State, unless the same be employed in or held or used in connection with some business carried on in whole or in part in this State. (1939, c. 158, s. 1; 1941, c. 50, s. 2; 1943, c. 400, s. 1; 1951, c. 643, s. 1; 1963, c. 941, ss. 1-3; 1967, c. 1110, s. 1; 1973, c. 1287, s. 2; 1977, c. 918; 1979, c. 801, s. 16; 1983 (Reg. Sess., 1984) c. 1023, s. 2; c. 1035.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1023, effective June 28, 1984, and applicable to gifts and transfers made on or after January 1, 1985, substituted "ten thousand dollars ($10,000)" for "three thousand dollars ($3,000)" in two places in the last sentence of subdivision (3).

The 1983 (Reg. Sess., 1984) amendment by c. 1035, effective July 1, 1984, and applicable to the estates of decedents dying on or after that date, inserted subdivision (7a).

CASE NOTES

Consent Judgment Is Final for Purposes of Subdivision (1). — A consent judgment entered in a caveat proceeding is, absent any evidence of collusion, a final judgment for purposes of subdivision (1) of this section. Medford v. Lynch, — N.C. App. —, 313 S.E.2d 593 (1984).

§ 105-3. Property exempt.

Legal Periodicals. —
For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-4. (Effective July 1, 1985) Rate of tax — Class A.

(a) Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife of the person who died possessed of such property aforesaid, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent in conformity with the laws of this State or of any of the United States, or of any foreign kingdom or nation, or a son-in-law or a daughter-in-law whose spouse is not entitled to any beneficial interest in such property of the person who died possessed of such property aforesaid, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $ 10,000	1 percent
Over $ 10,000 and to $ 25,000	2 percent
Over $ 25,000 and to $ 50,000	3 percent
Over $ 50,000 and to $ 100,000	4 percent
Over $ 100,000 and to $ 200,000	5 percent
Over $ 200,000 and to $ 500,000	6 percent
Over $ 500,000 and to $1,000,000	7 percent
Over $1,000,000 and to $1,500,000	8 percent
Over $1,500,000 and to $2,000,000	9 percent
Over $2,000,000 and to $2,500,000	10 percent
Over $2,500,000 and to $3,000,000	11 percent
Over $3,000,000	12 percent

(b) (1) The surviving spouse of a decedent shall be allowed a credit of four thousand six hundred fifty dollars ($4,650) against the taxes imposed under this Article. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article.

(2) If there is no surviving spouse or to the extent that a surviving spouse has not used all of the credit allowed under subdivision (1) of this subsection, the remainder of the credit shall be allowed on a pro rata basis according to tax liability to each child under 18 years of age and each child 18 years of age or older, who is mentally incapacitated, or by reason of physical disability is unable to support himself, is unmarried and residing with the decedent in his home at the time of the decedent's death, or who is then institutionalized on account of such mental incapacity or physical disability. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article.

(3) To the extent that minor children and physically and mentally disabled children have not used all of the credit allowed under subdivision (2) of this subsection, the remainder of the credit shall be allowed on a pro rata basis according to tax liability to each of the other Class A beneficiaries. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article. (1939, c. 158, s. 3; 1957, c. 1340, s. 1; 1965, c. 583; 1967, c. 1222; 1971, c. 651; 1973, c. 49, s. 1; c. 1142, s. 1; c. 1287, s. 2; 1977, c. 1004; 1979, c. 75; c. 801, ss. 20, 21; 1979, 2nd Sess., c. 1183, s. 1; 1983 (Reg. Sess., 1984), c. 1032.)

For this section as in effect until July 1, 1985, see the Replacement Volume and the 1983 Cumulative Supplement.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, and applicable to the estates of decedents dying on or after that date, substituted "four thousand six hundred fifty dollars ($4,650)" for "three thousand one hundred fifty dollars ($3,150)" in the first sentence of subdivision (b)(1).

§ 105-9. Deductions.

Legal Periodicals. —

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-22. Duties of clerks of superior court.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-23. Information by administrator and executor.

Legal Periodicals. —

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

Article 2B.

Schedule B-B. Soft Drink Tax.

§ 105-113.65: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1004, s. 1, effective June 28, 1984.

Article 3.

Schedule C. Franchise Tax.

§ 105-116. Franchise or privilege tax on electric light, power, gas, water, sewerage, and other similar public service companies not otherwise taxed.

(a) Every person, firm or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or piped gas, or owning and/or operating a water system subject to regulation by the North Carolina Utilities Commission, or owning and/or operating a public sewerage system shall, within 30 days after the first day of January, April, July and October of each year, make and deliver to the Secretary of Revenue, upon such forms and blanks as required by him, a report verified by the affirmation of the officer or authorized agent making such report and statement, containing the following information:

(1) The total gross receipts for the three months ending the last day of the month immediately preceding such return from such business within and without this State.

(2) The total gross receipts for the same period from such business within this State.

(3) The total gross receipts from the commodities or services described in this section sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a municipality having an ownership share in a project established under that Chapter.

(4) The total amount and price paid for such commodities or services purchased from others engaged in the above-named business in this State, and the name or names of the vendor.

(5) As to gas companies, the gross receipts derived from sales of piped gas to manufacturers which is to be used as an ingredient or component of a manufactured product.

Gross receipts shall be reported on an accrual basis.

(b) From the total gross receipts within this State there shall be deducted the gross receipts reported in subsection (a)(3) of this section.

(c) An annual franchise or privilege tax at the rates specified in this subsection is levied on the businesses listed in subsection (a). This tax is for the privilege of engaging in business in this State and is due and payable quarterly to the Secretary of Revenue when the report required by subsection (a) is filed. The tax on a public sewerage company is at the rate of six percent (6%) of the total gross receipts of the company derived within the State. The tax on an electric power company or a gas company is at the rate of three and twenty-two hundredths percent (3.22%) of the total gross receipts derived within the State. The tax on water companies is at the rate of four percent (4%) of the total gross receipts derived within the State. All deductions allowed by this section shall first be subtracted from total gross receipts to determine the total taxable gross receipts.

The tax imposed by this section does not apply to special charges collected within this State by natural gas utilities pursuant to drilling and exploration surcharges approved by the Utilities Commission, where such surcharges are segregated from the other receipts of the natural gas utility and are devoted to drilling, exploration and other means to acquire additional supplies of natural gas for the account of natural gas customers in North Carolina and where the beneficial interest in said surcharge collections is preserved for the natural gas customers paying said surcharges under rules established by the Utilities Commission.

(g) The Secretary of Revenue shall determine the total gross receipts derived from the sale within each municipality of the commodities or services described in this section, except water and sewerage services, and shall distribute to each municipality an amount equal to a tax of three and nine hundredths percent (3.09%) of the gross receipts from sales within the municipality. In determining the amount to be distributed to a municipality pursuant to this subsection, gross receipts from sales within a municipality do not include receipts from sales of piped gas to a manufacturer for use as an ingredient or component part of a manufactured product.

As soon as practicable after the date on which each quarterly payment of taxes is due under this section, the Secretary of Revenue shall certify to the State Disbursing Officer and to the State Treasurer the amount distributable to each municipality under this section. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each municipality in the amount so certified.

So long as there is a distribution to municipalities of the amount herein provided from the tax imposed by this section, no municipality shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947. If any municipality shall have collected any privilege, license or franchise tax between January 1, 1947, and April 1, 1949, in excess of the tax collected by it prior to January 1, 1947, then upon distribution of the taxes imposed by this section to municipalities, the amount distributable to any municipality shall be credited with such excess payment.

(1939, c. 158, s. 203; 1949, c. 392, s. 2; 1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1965, c. 517; 1967, c. 519, ss. 1, 3; c. 1272, ss. 1, 3; 1971, c. 298, s. 1; c. 833, s. 1; 1973, c. 476, s. 193; c. 537, s. 3; c. 1287, s. 3; c. 1349; 1975, c. 812; 1983 (Reg. Sess., 1984), c. 1097, ss. 2, 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, deleted "or owning and/or operating a street transportation system for the transportation of freight for hire" following "or owning and/or operating a public sewerage system" in the introductory paragraph of subsection (a), rewrote subdivision (a)(3), added the last sentence of subsection (a), deleted a proviso and a former second sentence at the end of subsection (b) relating to sales to tax-exempt entities and to electric memberships and non-profit corporations, rewrote subsection (c), and rewrote the first paragraph of subsection (g).

§ 105-120. Franchise or privilege tax on telephone companies.

(a) Every person, firm, or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this State, shall within 30 days after the first day of January, April, July and October of each year, make and deliver to the Secretary of Revenue a quarterly return, verified by the affirmation of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, license or privilege tax herein imposed. Gross receipts shall be reported on an accrual basis.

(b) An annual franchise or privilege tax of three and twenty-two hundredths percent (3.22%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this State. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside of this State or not: Provided, where any city or town in the State has heretofore sold at public auction to the highest bidder the right, license and/or privilege of engaging in such business in such city or town, based upon a percentage of gross revenue of such telephone company, and is now collecting and receiving therefor a revenue tax not exceeding one percent of such revenues, the amount so paid by such operating company, upon being certified by the treasurer of such municipality to the Secretary of Revenue, shall be from time to time credited by the Secretary of Revenue to such telephone company upon the tax imposed by the State under this section of this Chapter.

(d) The Secretary of Revenue shall ascertain the total gross receipts derived from local business conducted within each municipality in this State by persons, firms or corporations taxed under this section, and out of the tax levied by this section, an amount equal to a tax of three and nine hundredths percent (3.09%) of the gross receipts from local business conducted within any municipality shall be distributed to such municipality. When a person, firm or corporation taxed under this section properly receives a credit on said taxes under the proviso in subsection (b) because of payments made to a municipality, such municipality's distributive share of the taxes levied by this section shall be reduced by the amount of the credit properly received by said person, firm or corporation. If the credit received under the proviso is greater than the municipality's distributive share of the taxes levied under this section, no distribution to such municipality shall be made.

As soon as practicable after the date on which each quarterly payment of taxes is due under this section, the Secretary of Revenue shall certify to the State Disbursing Officer and to the State Treasurer the amount distributable to each municipality under this section. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each municipality in the amount so certified.

In determining what constitutes local business conducted within a municipality for the purposes of this subsection, all business originating within a municipality, except long-distance calls, shall be construed as local business.

The Department of Revenue is hereby authorized and empowered to require any and all persons, firms or corporations taxed under this section to file additional reports disclosing the gross receipts derived from local business as herein defined and the gross receipts from long-distance business.

If the records of the corporation taxed under this section do not readily disclose allocation to municipalities of revenues from local business as above defined, the Secretary of Revenue shall prescribe some practicable method of allocating such local revenues.

(1939, c. 158, s. 207; 1949, c. 392, s. 2; 1959, c. 1259, s. 3; 1967, c. 1272, ss. 2, 4; 1971, c. 298, s. 2; 1973, c. 476, s. 193; c. 1287, s. 3; 1983 (Reg. Sess., 1984), c. 1097, ss. 3, 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, added the last sentence of subsection (a), substituted "three and twenty-two hundredths percent (3.22%)" for "six percent (6%)" near the beginning of the first sentence of subsection (b) and substituted "three and nine hundredths percent (3.09%)" for "three percent (3%)" in the first sentence of subsection (d).

ARTICLE 4.

Schedule D. Income Tax.

DIVISION I. CORPORATION INCOME TAX.

§ 105-130.4. Allocation and apportionment of income for corporations.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-130.24: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1004, s. 2, effective June 28, 1984.

§ 105-130.27A. Credit against corporate income tax for construction of a peat facility.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-130.32. Credit against corporate income tax for installation of solar equipment for the production of industrial or process heat.

(a) Any corporation that constructs or installs solar equipment for the production of heat in the manufacturing or service processes of its business located in this State shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of the solar equipment. The credit allowed under this section may not exceed eight thousand dollars ($8,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the business at the time the solar equipment is installed. The credit allowed by this section may not exceed the amount of the

tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) As used in this section, "solar equipment" means equipment and materials designed to collect, store, transport, or control energy derived directly from the sun. (1981, c. 921, s. 1; 1983 (Reg. Sess., 1984), c. 1104, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1104, s. 2, provides: "This act shall become effective for tax years beginning on and after January 1, 1984. Nothing herein shall be construed to limit or repeal the existing G.S. 105-130.32 as it applies to tax years previous to January 1, 1984."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective for tax years beginning on and after January 1, 1984, rewrote the catchline and substituted "in the manufacturing or service processes of its business" for "in the manufacturing process of a manufacturing business" near the beginning of the first sentence of subsection (a).

§ 105-130.36. Credit for conservation tillage equipment.

(a) Any corporation that purchases conservation tillage equipment for use in a farming business, including tree farming, shall be allowed a credit against the tax imposed by this Division equal to twenty-five percent (25%) of the cost of the equipment. This credit may not exceed two thousand five hundred dollars ($2,500) for any income year for any taxpayer. The credit may only be claimed by the first purchaser of the equipment and may not be claimed by a corporation that purchases the equipment for resale or for use outside this State. This credit may not exceed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except tax payments made by or on behalf of the taxpayer. If the credit allowed by this section exceeds the tax imposed under this Division, the excess may be carried forward and applied to the tax imposed under this Division for the succeeding five years. The basis in any equipment for which a credit is allowed under this section shall be reduced by the amount of credit allowable.

(b) As used in this section, "conservation tillage equipment" means:

(1) A planter such as a planter commonly known as a "no-till" planter designed to minimize disturbance of the soil in planting crops or trees, including equipment that may be attached to equipment already owned by the taxpayer; or,

(2) Equipment designed to minimize disturbance of the soil in reforestation site preparation, including equipment that may be attached to equipment already owned by the taxpayer; provided, however, this shall include only those items of equipment generally known as a "KG-Blade", a "drum-chopper", or a "V-Blade". (1983 (Reg. Sess., 1984), c. 969, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 969, s. 3, makes this section effective for taxable years beginning on and after January 1, 1984.

§ 105-130.37. Credit for gleaned crop.

(a) Any corporation that grows a crop and permits the gleaning of the crop shall be allowed a credit against the tax imposed by this Division equal to ten percent (10%) of the market price of the quantity of the gleaned crop. This credit may not exeeed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except tax payments made by or on behalf of the taxpayer. No deduction is

allowed under G.S. 105-130.5(b)(5) for the items for which a credit is claimed under this section. Any unused portion of the credit may be carried forward for the succeeding five years.

(b) The following definitions apply to this section:

(1) "Gleaning" means the harvesting of a crop that has been donated by the grower to the nonprofit organization which will distribute the crop to individuals or other nonprofit organizations it considers appropriate recipients of the food;

(2) "Market price" means the season average price of the crop as determined by the North Carolina Crop and Livestock Reporting Service in the Department of Agriculture, or the average price of the crop in the nearest local market for the month in which the crop is gleaned if the Crop and Livestock Reporting Service does not determine the season average price for that crop; and

(3) "Nonprofit organization" means an organization for which contributions are deductible under G.S. 105-130.9 or 105-147(15) or (16). (1983 (Reg. Sess., 1984), c. 1018, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1018, s. 3, makes this section effective for taxable years beginning on or after January 1, 1984.

Division II. Individual Income Tax.

§ 105-141. "Gross income" defined.

Legal Periodicals. —
For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

Meaning of "Gift." — For North Carolina income tax purposes the definition of gift remains what it was at common law: "A voluntary transfer of property by one to another without any consideration therefor." Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

Union strike benefits are not taxable as income to the recipient under North Carolina law; such strike benefits qualify as a gift, thereby allowing the taxpayer to exclude them from taxable income. Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

Federal Practice Not Controlling under Subdivision (b)(3). — Whereas the General Assembly has specifically provided at numerous places in the income tax statutes that the state shall follow federal practice, the absence of such language in subdivision (b)(3) leads to the inference that, by exclusion, the legislature intended federal practice not to control it. Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

§ 105-142. Basis of return of net income.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

Subsection (a) of this section does not authorize any deductions not specifically authorized by North Carolina statute, nor does it require use of federal tax treatments. Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

Accounting Practices. — While it is true that subsection (a) provides that accounting methods selected by the state shall follow as nearly as practicable the federal practice, this provision, however, does not mandate use of federal accounting practices. Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

§ 105-144. Determination of gain or loss.

CASE NOTES

Cited in Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

§ 105-144.2. Sale of principal residence of taxpayer — nonrecognition of gain.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-145. Exchanges of property.

CASE NOTES

Cited in Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

§ 105-147. Deductions.

In computing net income there shall be allowed as deductions the following items:

(28) Amounts paid, not to exceed three thousand dollars ($3,000), for the maintenance and care of the individual's parent or parents. The deduction allowed by this subdivision shall be reduced by the amount by which the total value of all gifts of property, both tangible and intangible, received during the taxable year from the parent or parents for whom this deduction is claimed exceeds one hundred dollars ($100.00).

If the individual makes payments for the maintenance and care of one parent, the individual may take this deduction only if:

a. The individual does not take an exemption for the parent under G.S. 105-149(a)(5);
b. The parent is not in a public or private institution;
c. The parent's disposable income, as defined in G.S. 105-277.1(b)(2), does not exceed nine thousand dollars ($9,000);
d. The parent is aged 65 or older; and
e. The parent is a North Carolina resident.

If the individual makes payments for the maintenance and care of both parents, the individual may take this deduction only if:

a. The individual does not take an exemption for either parent under G.S. 105-149(a)(5);
b. Neither parent is in a public or private institution;
c. The parents' combined disposable income, as defined in G.S. 105-277.1(b)(2), does not exceed nine thousand dollars ($9,000);
d. At least one parent is aged 65 or over; and
e. Both parents are North Carolina residents. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, cc. 259, 550; c. 892, s. 6; c. 1110, s. 3; c. 1252, s. 2; 1969, cc. 725, 1082, 1123; c. 1175, s. 2; 1971, c. 1087, s. 2; c. 1206, s. 2; 1973, c. 476, s. 193; c. 1053, s. 5; c. 1262, s. 23; c. 1282; c. 1287, s. 5; c. 1338; 1975, c. 236, s. 1; c. 559, s. 1; c. 661, s. 1; c. 764, s. 5; 1977, c. 487; c. 657, s. 5; c. 771, s. 4; c. 890, ss. 1, 2; c. 900, s. 1; 1979, c. 179, s. 2; c. 659; c. 776, s. 2; c. 801, ss. 41-47; 1981, c. 653, s. 1; c. 704, s. 17; c. 899, s. 1; c. 957; c. 973, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1177, s. 2; c. 1205, ss. 2, 3; c. 1211, s. 4; 1983, c. 155, s. 1; c. 303, s. 1; c. 706, s. 1; c. 713, ss. 77, 78, 82, 84; c. 793, s. 4; 1983 (Reg. Sess., 1984), c. 1072.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective for taxable years beginning on January 1, 1985, added subdivision (28).

CASE NOTES

Cited in Stone v. Lynch, — N.C. App. —, 315 S.E.2d 350 (1984).

§ 105-149. Exemptions.

(a) There shall be deducted from the net income the following exemptions:
(1) In the case of a single individual who is not a head of household as defined in G.S. 105-135(8), a personal exemption of one thousand one hundred dollars ($1,100). In the case of a single individual who is a head of household, as defined in G.S. 105-135(8), a personal exemption of two thousand two hundred dollars ($2,200).
(2) In the case of a married couple living together, two thousand two hundred dollar ($2,200) exemption to the spouse having the larger adjusted gross income and one thousand one hundred dollar ($1,100) exemption to the other spouse; provided that the spouse having the larger income may by agreement with the other spouse allow that spouse to claim the two thousand two hundred dollar ($2,200) exemption in which case the spouse having the larger adjusted gross income must file a return and claim only the one thousand one hundred dollar ($1,100) exemption.
(2a) In the case of an individual who qualifies as "head of household" as defined in subdivision (8) of G.S. 105-135, two thousand two hundred dollars ($2,200), but the "head of household" exemption shall not be allowable to a married individual living with his or her spouse except as provided in subsection (c)(2) of this section. The "head of household"

exemption shall be in lieu of and not in addition to the exemptions established in subdivisions (1), (2), (4), (6) and (7) of subsection (a). Only one "head of household" exemption shall be allowable with respect to any one household, as the term "household" is defined in subdivision (8) of G.S. 105-135, and no individual shall be entitled to more than one "head of household" exemption.

(3) In the case of a married couple living together, the spouse who does not claim the two thousand two hundred dollar ($2,200) exemption as provided in (a)(2), one thousand one hundred dollars ($1,100).

(4) In the case of a widow or widower having minor child or children, natural or adopted, two thousand two hundred dollars ($2,200).

(5) For taxable years, beginning on or between January 1, 1980, and December 31, 1980, seven hundred dollars ($700.00) for each dependent (as defined below) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than one thousand dollars ($1,000), or who is a child of the taxpayer either under 19 years of age or a student regularly enrolled for full-time study in a school, college, or other institution of learning. For taxable years beginning on and after January 1, 1981, eight hundred dollars ($800.00) for each dependent (as defined below) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than one thousand dollars ($1,000), or who is a child of the taxpayer either under 19 years of age or a student regularly enrolled for full-time study in a school, college, or other institution of learning. For the purpose of the preceding sentence, the term "child" means an individual who is a son or daughter (natural or adopted), or a stepson or stepdaughter of the taxpayer.

An additional exemption of six hundred sixty dollars ($660.00) for a dependent (as defined in this subdivision) who is a full-time student at an accredited college or university or other institution of higher learning under such rules or regulations as may be prescribed by the Secretary of Revenue. For the purposes of this paragraph, the words "full-time student" shall mean a dependent enrolled in full-time study on the last day of the income year or enrolled for full-time study for a period of at least five months (whether or not consecutive) during the income year.

For the purposes of this subsection, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

a. A son or daughter (or a descendant of either), a stepson, or stepdaughter, a brother or sister (including a brother or sister of the half blood), a stepbrother, stepsister, father or mother (or an ancestor of either), a stepfather, a stepmother, a son or daughter of a brother or sister, a brother or sister of the father or mother, a son-in-law, a daughter-in-law, a father-in-law, a mother-in-law, a brother-in-law, or a sister-in-law of the taxpayer;

b. An individual who was a member of the same household as the taxpayer;

c. A former member of the same household as the taxpayer or an individual who otherwise qualifies as a dependent of the taxpayer, who for the taxable year of such taxpayer receives institutional care required by reason of a physical or mental disability.

The exemption provided in this subdivision for children of taxpayers shall be allowed only to the person claiming the two thousand two hundred dollar ($2,200) exemption provided in subdivision (2) of this

subsection except, however, that where husband and wife are divorced and have children of their marriage for which they would otherwise be entitled to an exemption hereunder, the parent furnishing the chief support of his (or her) child during the income year shall be entitled to said exemption, irrespective of whether said parent has custody of said child or children or is head of the household during said year.

For the purpose of determining the chief support of an individual other than a son or daughter (natural or adopted) or a stepson or stepdaughter of the taxpayer, over one half of the support of the individual for the calendar year shall be treated as received from the taxpayer if:

a. No one individual contributed over half of such support;
b. Over half of such support was received from individuals each of whom, but for the fact that he did not contribute over half of such support, would have been entitled to claim such individual as a dependent for a taxable year beginning in such calendar year;
c. The taxpayer contributed over ten percent (10%) of such support; and
d. Each individual described in paragraph b (other than the taxpayer) who contributed over ten percent (10%) of such support files a written declaration (in such manner and form as the Secretary of Revenue may prescribe) that he will not claim such individual as a dependent for any taxable year beginning in such calendar year.

Nothing in this subdivision shall be construed to allow one spouse to claim an exemption for the other spouse under this subdivision.

(6) In the case of an individual who has died during the income year, the same exemptions which would have been allowable to such individual under this subsection had the individual lived the entire income year.

(7) In the case of a divorced person having the sole custody of a minor child or children and receiving no alimony for the support of himself or herself, nor support for a child, or children, two thousand two hundred dollars ($2,200).

(8) In the case of any person who is blind, such person shall be entitled to an additional exemption of one thousand one hundred dollars ($1,100) in addition to all other exemptions allowed by law. Provided, such person shall submit to the Department of Revenue a certificate from a physician, an optometrist or from the Department of Human Resources certifying that such condition exists.

(8a) In the case of hemophiliacs meeting the criteria herein contained, such persons shall be entitled to an additional exemption of one thousand one hundred dollars ($1,100) in addition to all other exemptions provided by law. Eligible hemophiliacs shall be those who submit to the Division of Health Services of the Department of Human Resources a certificate from a physician or county health department, certifying that their condition is medically characterized as moderate or severe in the case of deficiencies of Factor VIII or Factor IX, or in the case of deficiencies in Factors I — VII or Factors X — XIII certifying that their condition causes physical or financial conditions similar to those resulting from Factor VIII or Factor IX deficiencies; and who attach a supporting statement to their North Carolina income tax return, including verification that said certificate has been obtained and submitted to the Division of Health Services of the Department of Human Resources.

An additional exemption of one thousand one hundred dollars ($1,100) is allowed in addition to all other exemptions provided by law, for each dependent (as defined in subdivision (a)(5) above), who is a

hemophiliac meeting the criteria set out in the above paragraph. The Division of Health Services of the Department of Human Resources is directed to develop said certificate and inform physicians and county health departments of its availability.

(8b) In the case of any person who is deaf, such person shall be entitled to an additional exemption of one thousand one hundred dollars ($1,100) in addition to all other exemptions provided by law. For purposes of this subdivision, an individual is deaf only if his average loss in the speech frequencies (500 to 2000 Hertz) in the better ear is 86 decibels (I.S.O.) or worse. Provided, such person shall submit to the Department of Revenue a certificate from a physician certifying that such condition exists.

(8c) In the case of persons suffering from chronic irreversible renal disease, whose condition requires that they utilize dialysis in connection with the amelioration of that condition, such persons shall be entitled to an additional exemption of one thousand one hundred dollars ($1,100) in addition to all other exemptions provided by law. Persons eligible for this exemption shall be those who submit to the Division of Health Services of the Department of Human Resources a certificate from a physician or county health department certifying that their condition is such that dialysis is required, as above provided, and who attach a supporting statement to their North Carolina income tax return, including verification that said certificate has been obtained and submitted to the Division of Health Services of the Department of Human Resources.

An additional exemption of one thousand one hundred dollars ($1,100) is allowed in addition to all other exemptions provided by law, for each dependent (as defined in subdivision (a) above) who suffers from chronic irreversible renal disease and who meets the criteria set out in the above paragraph. The Division of Health Services of the Department of Human Resources is directed to develop said certificate and inform physicians and county health departments of its availability.

(8d) For taxable years, beginning on or between January 1, 1979, and December 31, 1979, in the case of an individual who is paraplegic or who is disabled to the point that he must use a wheelchair to move about and to function effectively or who is a double-leg amputee above the knee, such individual shall be entitled to an exemption of one thousand dollars ($1,000) in addition to all other exemptions allowed by this section. For taxable years, beginning on and after January 1, 1980, that same individual shall be entitled to an exemption of one thousand one hundred dollars ($1,100) in addition to all other exemptions allowed by this section. Such individual shall submit to the Department of Revenue a certificate from a physician certifying that such condition exists.

(8e) In the case of persons with cystic fibrosis meeting the criteria herein contained, such persons shall be entitled to an additional exemption of one thousand one hundred dollars ($1,100) in addition to all other exemptions provided by law. Eligible persons with cystic fibrosis shall be those who submit to the Division of Health Services of the Department of Human Resources a certificate from a physician or county health department certifying that such condition exists.

An additional exemption of one thousand one hundred dollars ($1,100) is allowed in addition to all other exemptions provided by law for each dependent as defined above, who has cystic fibrosis and meets the criteria as set out above.

(9) In the case of an individual who has reached the age of 65 years on or before the last day of the taxable year, an exemption of one thousand one hundred dollars ($1,100) in addition to all other exemptions allowed by this section.

(10) In the case of each severely retarded person over half of whose support for the taxable year has been provided by a parent or guardian, there shall be allowed an exemption of two thousand two hundred dollars ($2,200) in addition to all other exemptions allowed by this subsection. For the purposes of this subdivision, "severely retarded" shall mean a person whose intelligence quotient falls below 40.

In order to qualify for such exemption the parents or guardian of said persons shall provide the Department of Revenue with a statement verifying the condition of said persons from any medical doctor licensed to practice in North Carolina or any medical doctor who has graduated from a medical college approved by the Board of Medical Examiners of the State of North Carolina and holds a license granted by any state of the United States or the District of Columbia or practicing psychologist or psychological examiner licensed to practice in North Carolina or any practicing psychologist or psychological examiner licensed or certified as a psychologist or psychological examiner by another state of the United States or the District of Columbia.

(1939, c. 158, s. 324; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 716, s. 2; c. 1110, s. 3; 1969, c. 1075, s. 4; 1971, c. 1087, s. 1; 1973, c. 468, ss. 1, 2; c. 476, ss. 143, 193; c. 1287, s. 5; 1975, c. 489, ss. 1, 2; c. 739, s. 1; 1977, c. 309, ss. 1-4; cc. 898, 1101; 1979, c. 801, ss. 48-66; 1983 (Reg. Sess., 1984), c. 1075, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1075, s. 2, directs the Division of Health Services of the Department of Human Resources to develop the certificate provided for in subdivision (a)(8e) and to inform physicians and county health departments of its availability.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective for taxable years beginning on or after January 1, 1984, inserted subdivision (a)(8e).

§ 105-151.3: Repealed by Session Laws 1983 (Regular Session 1984), c. 1004, s. 2, effective June 28, 1984.

§ 105-151.6A. Credit against personal income tax for construction of a peat facility.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-151.8. Credit against personal income tax for installation of solar equipment for the production of industrial or process heat.

(a) Any person who constructs or installs solar equipment for the production of heat in the manufacturing or service processes of his business located in this State shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of the solar

equipment. The credit allowed under this section may not exceed eight thousand dollars ($8,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the business at the time the solar equipment is installed. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payment of tax made by or on behalf of the taxpayer. In no case shall a tax credit be allowed both under the provisions of this section and G.S. 105-151.2.

(b) In the case of property owned by the entirety, where both spouses are required to file North Carolina income tax returns, each spouse may claim one half of the credit allowed by this section or one spouse may claim the entire credit allowed by this section by agreement with the other spouse, provided both spouses were living together at the end of the taxable year and file their separate returns for the taxable year on the combined form. Where only one spouse is required to file a North Carolina income tax return, such spouse may claim the credit allowed by this section.

(c) As used in this section, "solar equipment" means equipment and materials designed to collect, store, transport, or control energy derived directly from the sun. (1981, c. 921, s. 2; 1983 (Reg. Sess., 1984), c. 1105, s. 1.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1105, s. 2, provides: "This act shall become effective for the tax years beginning on and after January 1, 1984. Nothing herein shall be construed to limit or repeal the existing G.S. 105-151.8 as it applies to tax years previous to January 1, 1984."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective for tax years beginning on and after January 1, 1984, rewrote the catchline and substituted "in the manufacturing or service processes of his business" for "in the manufacturing process of a manufacturing business" near the beginning of the first sentence of subsection (a).

§ 105-151.12. Credit for certain real property donations.

(d) The fair market value, or any portion thereof, of a qualifying donation that is not eligible for a credit pursuant to this section may be considered as a charitable contribution pursuant to G.S. 105-147(15) or (16). That portion of the donation allowed as a credit pursuant to this section shall not be eligible as a charitable contribution.

(1983, c. 793, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Subsection (d) of this section is set out to correct an error in the 1983 Cumulative Supplement.

§ 105-151.13. Credit for conservation tillage equipment.

(a) Any person who purchases conservation tillage equipment for use in a farming business, including tree farming, shall be allowed a credit against the tax imposed by this Division equal to twenty-five percent (25%) of the cost of the equipment. This credit may not exceed two thousand five hundred dollars ($2,500) for any income year. The credit may only be claimed by the first purchaser of the equipment and may not be claimed by a person who purchases the equipment for resale or for use outside this State. This credit may not exceed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except tax payments

made by or on behalf of the taxpayer. If the credit allowed by this section exceeds the tax imposed under this Division, the excess may be carried forward and applied to the tax imposed under this Division for the succeeding five years. The basis in any equipment for which a credit is allowed under this section shall be reduced by the amount of the credit allowable.

(b) As used in this section, "conservation tillage equipment" means:

(1) A planter such as a planter commonly known as a "no-till" planter designed to minimize disturbance of the soil in planting crops or trees, including equipment that may be attached to equipment already owned by the taxpayer; or,

(2) Equipment designed to minimize disturbance of the soil in reforestation site preparation, including equipment that may be attached to equipment already owned by the taxpayer; provided, however, this shall include only those items of equipment generally known as a "KG-Blade", a "drum-chopper", or a "V-Blade".

(c) In the case of conservation tillage equipment owned jointly by a husband and wife, where both spouses are required to file North Carolina income tax returns, each spouse may claim one-half of the credit allowed by this section or one spouse may claim the entire credit allowed by this section by agreement with the other spouse, provided both spouses were living together at the end of the taxable year and file their separate returns for the taxable year on the combined form. (1983 (Reg. Sess., 1984), c. 969, s. 2.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 969, s. 3, makes this section effective for taxable years beginning on and after January 1, 1984.

§ 105-151.14. Credit for gleaned crop.

(a) Any person who grows a crop and permits the gleaning of the crop shall be allowed a credit against the tax imposed by this Division equal to ten percent (10%) of the market price of the quantity of the gleaned crop. This credit may not exceed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except tax payments made by or on behalf of the taxpayer. No deduction is allowed under G.S. 105-147(15) or (16) for the items for which a credit is claimed under this section. Any unused portion of the credit may be carried forward for the succeeding five years.

(b) The following definitions apply to this section:

(1) "Gleaning" means the harvesting of a crop that has been donated by the grower to a nonprofit organization which will distribute the crop to individuals or other nonprofit organizations it considers appropriate recipients of the food;

(2) "Market price" means the season average price of the crop as determined by the North Carolina Crop and Livestock Reporting Service in the Department of Agriculture, or the average price of the crop in the nearest local market for the month in which the crop is gleaned if the Crop and Livestock Reporting Service does not determine the season average price for that crop; and

(3) "Nonprofit organization" means an organization for which contributions are deductible under G.S. 105-130.9 or 105-147(15) or (16). (1983 (Reg. Sess., 1984), c. 1018, s. 2.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1018, s. 3, makes this section effective for taxable years beginning on or after January 1, 1984.

§ 105-159. Corrections and changes.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

ARTICLE 5.

Schedule E. Sales and Use Tax.

DIVISION I. TITLE, PURPOSE AND DEFINITIONS.

§ 105-164.3. Definitions.

The words, terms and phrases when used in this Article shall have the meanings ascribed to them in this section except when the context clearly indicates a different meaning:

(20) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance or other obligations or securities, nor shall it include water delivered by or through main lines or pipes either for commercial or domestic use or consumption. The term includes all "canned" or prewritten computer programs, either in the form of written procedures or in the form of storage media on which or in which the program is recorded, held, or existing for general or repeated sale, lease, or license to use or consume. The term does not include the design, development, writing, translation, fabrication, lease, license to use or consume, or transfer for a consideration of title or possession of a custom computer program, other than a basic operational program, either in the form of written procedures or in the form of storage media on which or in which the program is recorded, or any required documentation or manuals designed to facilitate the use of the custom computer program.

As used in this subdivision:

a. "Basic operational program" or "control program" means a computer program that is fundamental and necessary to the functioning of a computer. A basic operational program is that part of an operating system, including supervisors, monitors, executives, and control or master programs, which consists of the control program elements of that system. A control or master program, as opposed to a processing program, controls the operation of a computer by managing the allocation of all system resources, including the central processing unit, main storage, input/output devices, and processing programs. A processing program is used to develop and implement the specific applications the computer is to perform.

b. "Computer program" means the complete plan for the solution of a problem, such as the complete sequence of automatic data-processing equipment instructions necessary to solve a problem, and includes both systems and application programs and subdivisions, such as assemblers, compliers, routines, generators, and utility programs.

c. "Custom computer program" means a computer program prepared to the special order of the customer. Custom computer programs include one of the following elements:
1. Preparation or selection of the programs for the customer's use requires an analysis of the customer's requirements by the vendor; or
2. The program requires adaptation by the vendor to be used in a particular make and model of computer utilizing a specified output device.

d. "Storage media" means punched cards, tapes, disks, diskettes, or drums.

(25) "Utility" means an electric power company, a gas company, or a telephone company that is subject to a privilege tax based on gross receipts under G.S. 105-116 or G.S. 105-120, or a municipality that sells electric power. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 104; c. 275, s. 6; 1979, c. 48, s. 2; c. 71; c. 801, s. 72; 1983, c. 713, ss. 87, 88; 1983 (Reg. Sess., 1984), c. 1097, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, deleted "electricity, gas or" preceding "water delivered by or through main lines" in the second sentence of subdivision (20) and added subdivision (25).

Division II. Taxes Levied.

Part 1. Retail Sales Tax.

§ 105-164.4. Imposition of tax; retailer.

There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

(1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State, the tax to be computed on total net taxable sales as defined herein but for the purpose of computing the amount due the State each and every taxable retail sale, or retail sales upon which the tax has been collected, or the amount of tax actually collected, whichever be greater and whether or not erroneously collected, shall be included in the computation of tax due the State. Provided, however, that in the case of the sale of any aircraft, railway locomotive, railway car or the sale of any motor vehicle or boat, the tax shall be only at the rate of two percent (2%) of the sales price, but at no time shall the maximum tax with respect to any one such aircraft, railway locomotive, railway car or motor vehicle or boat, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of three hundred dollars ($300.00).

The separate sale of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or by different retailers shall be subject only to the tax herein prescribed with respect to a single motor vehicle. No tax shall be imposed upon a body mounted on the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof.

Notwithstanding G.S. 105-164.3(16) and regardless whether the seller is a retailer of motor vehicles, the sales price of a motor vehicle is the gross sales price of the motor vehicle less any allowance given for a motor vehicle taken in trade as part of the consideration for the purchased motor vehicle.

The tax levied under this section applies to all retail sales of motor vehicles regardless whether the seller is engaged in business as a retailer of motor vehicles or whether a tax on the sale of the vehicle has previously been paid under this Article. A purchaser of a motor vehicle from a retailer shall pay the tax imposed under this Article to the retailer, who is liable for collecting and remitting the tax to the Secretary. A purchaser of a motor vehicle is liable for payment of the tax imposed by this Article if the seller is not a retailer. The purchaser shall pay the tax to the Commissioner of Motor Vehicles when applying for a certificate of title for the vehicle.

When applying for a certificate of title, a purchaser of a motor vehicle from a seller who is not a retailer shall certify in writing the sales price of the purchased motor vehicle. A purchaser who knowingly makes a false certification of the sales price is guilty of a misdemeanor.

The Commissioner of Motor Vehicles may not issue a certificate of title for a motor vehicle sold by a seller who is not a retailer unless the tax imposed by this section is paid when the purchaser of the vehicle applies for a certificate of title. The Commissioner shall remit taxes collected by him under this subsection to the Secretary.

Persons who lease or rent motor vehicles shall collect and remit the tax imposed by this Article on the separate retail sale of a motor vehicle in addition to the tax imposed on the proceeds from the lease or rental of the motor vehicle.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price on the following items:

a. Horses or mules by whomsoever sold.

b. Semen to be used in the artificial insemination of animals.

c. Sales of fuel, other than electricity or piped natural gas, to farmers to be used by them for any farm purposes other than preparing food, heating dwellings and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.

d. Sales of fuel, other than electricity or piped natural gas, to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuels to be used for residential heating purposes. The quantity of fuel purchased used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.

e. Sales of fuel, other than electricity or piped natural gas, to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars ($80.00) per article, on the following items:

g. Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops, and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, which are operated, drawn or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under Chapter 20 of the General Statutes.

The term shall include all nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached to handfired furnaces or used in connection with mechanical burners.

h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants, and sales to contractors and subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with manufacturing industries and plants, and sales to subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with general contractors who have contracts with manufacturing industries and plants.

i. Sales of central office equipment and switchboard and private branch exchange equipment to telephone companies regularly engaged in providing telephone service to subscribers on a commercial basis, and sales to these companies of prewritten computer programs used in providing telephone service to their subscribers.

j. Sales to commercial laundries or to pressing and dry-cleaning establishments of machinery used in the direct performance of the laundering or the pressing and cleaning service and of parts and accessories thereto.

k. Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto.

l. Sales of broadcasting equipment and parts and accessories thereto and towers to commercial radio and television companies which are under the regulation and supervision of the Federal Communications Commission.

m. Sales to farmers of bulk tobacco barns and racks and all parts and accessories thereto and similar apparatus used for the curing and drying of any farm produce.

n. Sales to farmers of commercially manufactured swine, livestock, or poultry equipment or facilities and accessories thereto. The sale of the total number of poultry cages to be served by the same automatic feeder, automatic waterer, or automatic egg collector constitutes the sale of a single article that is separate and distinct from a feeder, waterer, or egg collector.

o. Sales to farmers of grain, feed or soybean storage facilities and accessories thereto, whether or not dryers are attached, and all similar apparatus and accessories thereto for the storage of grain, feed or soybeans.

p. Repealed by Session Laws 1983, c. 805, s. 2, effective July 1, 1983.

q. Sales of containers to farmers or producers for use in the planting, producing, harvesting, curing, marketing, packaging, sale, or transporting or delivery of their products when such containers do not go with and become part of the sale of their products at wholesale or retail.

(4a) At the rate of three percent (3%) of the gross receipts derived by a utility from sales of electricity, piped natural gas, or intrastate telephone service. A person who operates a utility is considered a retailer under this Article.

(1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1065, ss. 1, 2; c. 1097, ss. 6, 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983, c. 713, s. 110, as added by Session Laws 1983 (Reg. Sess., 1984), c. 1065, s. 4, provides:

"Sec. 110. Sections 89 and 90 of this act do not apply to a sale of a motor vehicle delivered after the efective date of the tax increase imposed by those sections pursuant to a written contract made between a retail dealer of motor vehicles and the buyer of the vehicle before the effective date of the tax increase if the contract price of the vehicle included the projected sales tax due on the sale of the vehicle and computed the amount of sales due at the then maximum rate of one hundred twenty dollars ($120.00). A retail dealer who was a party to a contract described in this section and who reduced his profit on the sale to absorb the increase in the sales tax may apply to the Secretary of Revenue for a refund of the difference between the sales tax paid on the sale of the vehicle and one hundred twenty dollars ($120.00). A buyer of a vehicle who was a party to a contract described in this section and who paid more than the contract price of the vehicle because he paid the additional sales tax due may apply to the retail dealer from whom he purchased the vehicle for a refund of the difference between the sales tax the buyer paid and one hundred twenty dollars ($120.00). A dealer who receives a refund request from a buyer shall apply on behalf of the buyer to the Secretary of Revenue for the requested refund. A refund request made pursuant to this section shall be made within six months following June 20, 1984. The Secretary of Revenue shall grant requests for refunds made under this section upon proof satisfactory to the Secretary that the applicant is eligible for the refund."

Section 5 of Session Laws 1983 (Reg. Sess., 1984), c. 1065, makes s. 4 of the act effective upon ratification. The act was ratified July 2, 1984.

Session Laws 1983, c. 761, s. 140, provides that notwithstanding § 105-164.4(1), the

Department of Transportation may deduct and retain from the sales tax on motor vehicles an amount equal to the cost to the Division of collecting this tax, not to exceed $475,000 per year, and that the cost of collecting this tax shall be determined by Secretary of Transportation subject to the approval of the State Budget Officer. As amended by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 202, the 1983 Act further provides that notwithstanding § 20-63(h) the cost of collection shall include an increase in the commission paid to the branch agents of Division to 70¢ per transaction. Session Laws 1983, c. 923, s. 217, makes s. 140 of c. 761 effective Aug. 1, 1983. Session Laws 1983, c. 761, s. 259, is a severability clause.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes c. 1034 effective July 1, 1984. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1065, ss. 1 and 2, effective July 1, 1984, inserted "and regardless whether the seller is a retailer of motor vehicles" in the third paragraph of subdivision (1) and rewrote the fourth, fifth, and sixth paragraphs of subdivision (1).

The 1983 (Reg. Sess., 1984) amendment by c. 1097, ss. 6 and 13, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, substituted "Sales of fuel, other than electricity or piped natural gas" for "Sales of fuels" at the beginning of paragraph (1)c and for "Sales of fuel" at the beginning of paragraphs (1)d and (1)e, and inserted subdivision (4a).

Legal Periodicals. —

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

Part 3. Use Tax.

§ 105-164.6. Imposition of tax.

An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price, to wit:

(3a) Every person, firm, or corporation that purchases or acquires a motor vehicle shall pay a tax at the rate of two percent (2%) of the sales price of the vehicle, not to exceed three hundred dollars ($300.00) per vehicle. This tax shall be paid to the Commissioner of Motor Vehicles when applying for a certificate of title or registration plate for the vehicle. A purchaser who furnishes to the Commissioner of Motor Vehicles a certificate from a retailer of motor vehicles engaged in business in this State stating that the purchaser has paid the tax levied on the vehicle by this Article to the retailer is relieved of liability for the tax. No certificate of title, or registration and license plate or plates shall be issued for any motor vehicle purchased or acquired for use on the streets and highways of this State unless and until the tax provided for under this Article on motor vehicles has been paid. Nothing herein is intended to relieve any retailer of motor vehicles engaged in business in this State from his liability for collecting and remitting sales or use tax on his sales of motor vehicles for use by the purchasers thereof in this State and no retailer shall be absolved of this liability for his failure to collect the tax from such purchasers. The Commissioner of Motor Vehicles shall remit use taxes collected by him under this subdivision to the Secretary.

The tax levied under this section applies to all owners of motor vehicles, regardless whether the owner purchased or acquired the vehicle from a retailer of motor vehicles and regardless whether a tax has previously been paid under this Article with respect to the vehicle.

An owner of a motor vehicle acquired from a seller who is not a retailer shall certify the sales price of the vehicle as provided in G.S. 105-164.4(1).

Persons who lease or rent motor vehicles shall collect and remit the tax imposed by this Article on the separate retail sale of a motor vehicle in addition to the tax imposed on the proceeds from the lease or rental of the motor vehicle.

(1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 17, s. 2; c. 48, ss. 3, 4; c. 179, s. 3; c. 527, s. 2; 1979, 2nd Sess., c. 1100, s. 1; c. 1175; 1981, cc. 18, 65; 1983, c. 713, s. 90; 1983 (Reg. Sess., 1984), c. 1065, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 713, s. 110, as added by Session Laws 1983 (Reg. Sess., 1984), c. 1065, s. 4, provides:

"Sec. 110. Sections 89 and 90 of this act do not apply to a sale of a motor vehicle delivered after the effective date of the tax increase imposed by those sections pursuant to a written contract made between a retail dealer of motor vehicles and the buyer of the vehicle before the effective date of the tax increase if the contract price of the vehicle included the projected sales tax due on the sale of the vehicle and computed the amount of sales due at the then maximum rate of one hundred twenty dollars ($120.00). A retail dealer who was a party to a contract described in this section and who reduced his profit on the sale to absorb the increase in the sales tax may apply to the Secretary of Revenue for a refund of the difference between the sales tax paid on the sale of the vehicle and one hundred twenty dollars ($120.00). A buyer of a vehicle who was a party to a contract described in this section and who paid more than the sales tax due may apply to the retail dealer from whom he purchased the vehicle for a refund of the difference between the sales tax the buyer paid and one hundred twenty dollars ($120.00). A dealer who receives a refund request from a buyer shall apply on behalf of the buyer to the Secretary of Revenue for the requested refund. A refund request made pursuant to this section shall be made within six months following June 20, 1984. The Secretary of Revenue shall grant requests for refunds made under this section upon proof satisfactory to the Secretary that the applicant is eligible for the refund."

Section 5 of Session Laws 1983 (Reg. Sess., 1984), c. 1065, makes s. 4 of the act effective upon ratification. The act was ratified July 2, 1984.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, in subdivision (3a) deleted "or purchase" preceding "price of the vehicle" and deleted "as determined in accordance with G.S. 105-164.1(1)" thereafter in the first sentence of the first paragraph, and rewrote the last sentence of the second paragraph, which read "The sale price of a motor vehicle acquired from a person who is not a retailer shall be determined in accordance with G.S. 105-164.4(1)."

CASE NOTES

Applied in In re Assessment of Additional N.C. & Orange County Use Taxes, — N.C. App. —, 311 S.E.2d 366 (1984).

Division III. Exemptions and Exclusions.

§ 105-164.13. (Effective July 1, 1985) Retail sales and use tax.

The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:

Agricultural Group.

(1) Commercial fertilizer on which the inspection tax is paid and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.

(2) Seeds; remedies, vaccines, medications, litter materials, and feeds for livestock and poultry; rodenticides, insecticides, herbicides, fungicides, and pesticides for livestock, poultry, and agriculture; defoliants for use on cotton or other crops; plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops.

(3) Products of farms, forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.

(4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.

(4a) Baby chicks and poults sold for commercial poultry or egg production.

Industrial Group.

(5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered wholesale or retail merchants, for the purpose of resale except as modified by Division I, G.S. 105-164.3, subdivision (23). Provided, however, this exemption shall not extend to or include retail sales to users or consumers not for resale.

(6) Ice, whether sold by the manufacturer, producer, wholesale or retail merchant.

(7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.

(8) Sales of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured.

(9) Sales of boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies to persons for use by them principally in commercial fishing operations within the meaning of G.S. 113-152, except when the property is for use by persons principally to take fish for recreation or personal use or consumption. As used in this subdivision, "fish" is defined as in G.S. 113-129(7).

(10) Sales to commercial laundries or to pressing and dry cleaning establishments of articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.

Motor Fuels Group.

(11) Gasoline or other motor fuel on which the tax levied in G.S. 105-434 and/or G.S. 105-435 of the General Statutes is due and has been paid, and the fact that a refund of the tax levied by either of said sections is made pursuant to the provisions of Subchapter V of Chapter 105

shall not make the sale or the seller of such fuels subject to the tax levied by this Article.

Medical Group.

(12) Therapeutic, prosthetic, or artificial devices, such as pulmonary respirators or medical beds, that are designed for individual personal use to correct or alleviate physical illness, disease, or incapacity and that are sold on the written prescription of a physician, dentist, or other professional person licensed to prescribe, and crutches, artificial limbs, artificial eyes, hearing aids, false teeth, eyeglasses ground on prescription of a physician or an optometrist, and orthopedic appliances designed to be worn by the purchaser or user. This subdivision does not apply to a motor vehicle.

(13) Medicines sold on prescription of physicians and dentists.

Printed Materials Group.

(14) Holy Bibles; public school books on the adopted list, the selling price of which is fixed by State contract.

(14a) Printed material which is sold by a printer to a purchaser within or without this State, when such printed material is delivered in this State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State, if the purchaser does not thereafter use the printed material in this State.

Transactions Group.

(15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales, provided, however, they must be added to gross sales if afterwards collected.

(16) Sales of used articles other than motor vehicles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this Article is paid on the gross sales price of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the merchant, and shall not be limited to newly manufactured articles. The resale of articles other than motor vehicles repossessed by the vendor shall likewise be exempt from gross sales taxable under this Article.

Exempt Status Group.

(17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

(18) Funeral expenses, including coffins and caskets, not to exceed one hundred and fifty dollars ($150.00). All other funeral expenses, including gross receipts for services rendered, shall be taxable at the rate of three percent (3%). However, "services rendered" shall not include those services which have been taxed pursuant to G.S. 105-164.4(4), or to those services performed by any beautician, cosmetologist, hairdresser or barber employed by or at the specific direction of the family or personal representative of a deceased; and "funeral expenses" and "services rendered" shall not include death certificates procured by or at the specific direction of the family or personal representative of a deceased. Where coffins, caskets or vaults are purchased direct and a separate charge is paid for services, the provisions of this subdivision shall apply to the total for both.

(19) Sales by concession stands operated by the State prison system within the confines of the prisons where such sales are made to prison inmates and guards therein while on duty.

(20) Sales by blind merchants operating under supervision of the Department of Human Resources.

(21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.

(22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.

(23) Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.

(24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.

(25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.

(26) Lunches to school children when such sales are made within school buildings and are not for profit.

(27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.

(28) Sales of newspapers by newspaper street vendors and by newspaper carriers making door-to-door deliveries and sales of magazines by magazine vendors making door-to-door sales.

(29) Sales to the North Carolina Museum of Art of paintings and other objects or works of art for public display, the purchases of which are financed in whole or in part by gifts or donations.

(30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale.

(31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.

(32) Sales of motor vehicles, as defined in G.S. 105-164.3(8a), to nonresident purchasers for immediate transportation to and use in another state in which such vehicles are required to be registered, provided the seller obtains from the purchaser and furnishes to the Secretary of Revenue an affidavit stating the name and address of the purchaser, the state in which the vehicle will be registered and operated, the make, model, and serial number of the vehicle, and such other information as the Secretary may require, and provided further that no exemption shall be allowed unless the affidavit is filed with the seller's sales and use tax report for the month during which the sale is made and such report is timely filed. For sales made by a seller who is not a retailer, this exemption applies if the purchaser furnishes the Secretary an affidavit containing the information otherwise required from a retailer within 45 days of the date of the sale.

(33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

(34) Sales of items by a nonprofit civic, charitable, educational, scientific or literary organization when the net proceeds of the sales will be given or contributed to the State of North Carolina or to one or more of its agencies or instrumentalities, or to one or more nonprofit charitable organizations, one of whose purposes is to serve as a conduit

through which such net proceeds will flow to the State or to one or more of its agencies or instrumentalities.

(35) Sales by a nonprofit civic, charitable, educational, scientific, literary or fraternal organization continuously chartered or incorporated within North Carolina for at least two years when such sales are conducted only upon an annual basis for the purpose of raising funds for its activities, and when the proceeds thereof are actually used for such purposes; provided, however, that no such sale shall be exempt if not actually consummated within 60 days after the first solicitation of any sale made during said organization's annual sales period.

(36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1; 1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887; 1983 (Reg. Sess., 1984), c. 1071, s. 1.)

For this section as in effect until July 1, 1985, see 1983 Cumulative Supplement.

Editor's Note. — The designation of subdivision (4.1) has been changed to (4a) at the direction of the Revisor of Statutes in the interests of internal consistency.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, rewrote subdivision (12).

CASE NOTES

"Newspaper" Defined. — A newspaper is a publication appearing at short intervals of time containing news which may be of various types, and intended for the general reader. In re Assessment of Additional N.C. & Orange County Use Taxes, — N.C. App. —, 311 S.E.2d 366 (1984).

Publication devoted almost entirely to advertising which does not disseminate news except in very small amounts, does not qualify as a newspaper but is instead an advertising circular. In re Assessment of Additional N.C. & Orange County Use Taxes, — N.C. App. —, 311 S.E.2d 366 (1984).

§ 105-164.14. Certain refunds authorized.

(b) The Secretary of Revenue shall make refunds semiannually to hospitals not operated for profit (including hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 12 of Chapter 131), educational institutions not operated for profit, churches, orphanages and other charitable or religious institutions and organizations not operated for profit of sales and use taxes paid under this Article, except under G.S. 105-164.4(4a), by such institutions and organizations on direct purchases of tangible personal property for use in carrying on the work of such institutions or organizations. Sales and use tax liability indirectly incurred by such institutions and organizations on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired for such institutions and organizations for carrying on their nonprofit activities shall be construed as sales or use tax liability incurred on direct purchases by such institutions and organizations, and such institutions and organizations may obtain refunds of such taxes indirectly paid. The Secretary of Revenue shall also make refunds semiannually to all other hospitals (not specifically excluded herein) of sales and use tax paid by them on medicines and drugs purchased for use in carrying

out the work of such hospitals. This subsection does not apply to organizations, corporations, and institutions that are owned and controlled by the United States, the State, or a unit of local government, except hospital facilities created under Article 12 of Chapter 131 of the General Statutes and nonprofit hospitals owned and controlled by a unit of local government that elect to receive semiannual refunds under this subsection instead of annual refunds under subsection (c). In order to receive the refunds herein provided for, such institutions and organizations shall file a written request for refund covering the first six months of the calendar year on or before the fifteenth day of October next following the close of said period, and shall file a written request for refund covering the second six months of the calendar year on or before the fifteenth day of April next following the close of that period. Such requests for refund shall be substantiated by such proof as the Secretary of Revenue may require, and no refund shall be made on applications not filed within the time allowed by this section and in such manner as the Secretary may require.

(c) Upon receipt of timely applications for refund, the Secretary of Revenue shall make refunds annually to all governmental entities, as hereinafter defined, of sales and use tax paid under this Article, except under G.S. 105-164.4(4a), by said governmental entities on direct purchases of tangible personal property. Sales and use tax liability indirectly incurred by such governmental entities on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired which is owned or leased by such governmental entities shall be construed as sales or use tax liability incurred on direct purchases by such governmental entities, and such entities may obtain refunds of such taxes indirectly paid. The refund provisions contained in this subsection shall not apply to any governmental entities not specifically named herein. In order to receive the refund herein provided for, governmental entities shall file a written request for said refund within six months of the close of the fiscal year of the governmental entities seeking said refund, and such request for refund shall be substantiated by such records, receipts and information as the Secretary may require. No refunds shall be made on applications not filed within the time allowed by this section and in such manner as the Secretary may otherwise require. The term "governmental entities," for the purposes of this subsection, shall mean all counties, incorporated cities and towns, water and sewer authorities created and existing under the provisions of Chapter 162A of the General Statutes, sanitary districts, regional councils of governments created pursuant to G.S. 160A-470, area mental health boards (other than single-county boards) established pursuant to Article 2F of Chapter 122 of the General Statutes, district health departments, regional planning and economic development commissions created pursuant to G.S. 158-14, regional economic development commissions created pursuant to G.S. 158-8, regional planning commissions created pursuant to G.S. 153A-391, metropolitan sewerage districts and metropolitan water districts in this State.

(1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286; 1973, c. 476, s. 193; 1977, c. 895, s. 1; 1979, c. 47; c. 801, ss. 77, 79-82; 1983, c. 594, s. 1; c. 891, s. 13; 1983 (Reg. Sess., 1984), c. 1097, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Article 12 of Chapter 131, referred to in this section, was repealed by Session Laws 1983, c. 775, s. 1, effective January 1, 1984. As to hospital authorities, see now § 131E-15 et seq.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or

after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, inserted "except under G.S. 105-164.4(4a)" in the first sentences of subsections (b) and (c).

Division IV. Reporting and Payment.

§ 105-164.16. Taxes due monthly; reports and payment of tax.

The taxes levied under the provisions of this Article shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrues, except as otherwise provided herein. Every taxpayer liable for the tax imposed by this Article shall on or before the fifteenth day of the month next succeeding the month in which the tax accrues make out, prepare and render a return on the form prescribed by the Secretary, containing a true and correct statement showing the total gross sales, accompanied by an itemized statement showing the amount of sales in each group of exemptions and exclusions covered by G.S. 105-164.13 which are not subject to the tax or are not used as a measurement of the taxes due by such taxpayer together with such other information as the Secretary may require and at the time of making such monthly return such taxpayer shall compute the taxes due and shall pay to the Secretary the amount of taxes shown to be due. When the total amount of tax for which a taxpayer is liable for any month is consistently less than twenty-five dollars ($25.00), such taxpayer may file a quarterly return with remittance of tax in lieu of a monthly return on or before the fifteenth day of January, April, July, and October of each year for the preceding three months' period upon making application to the Secretary to use such basis of filing. Returns shall be signed by the retailer or his duly authorized agent. Taxes levied under G.S. 105-164.4(4a) are due and payable quarterly on or before the 30th day following the end of the calendar quarter in which the tax accrues.

Any return which does not conform strictly to the requirements in respect to its content shall not be a lawful return and the Secretary shall require the immediate filing of a proper return in default of which he shall assess a deficiency as hereinafter provided. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 801, s. 83; 1983 (Reg. Sess., 1984), c. 1097, s. 14.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, inserted the last sentence of the first paragraph.

§ 105-164.20. Cash or accrual basis of reporting.

Any retailer, except a utility, taxable under this Article having both cash and credit sales may report such sales on either the cash or accrual basis of accounting upon making application to the Secretary for permission to use such basis of reporting under such rules and regulations as shall be promulgated from time to time by the Secretary. Such permission shall continue in force and effect unless revoked by the Secretary but he may grant written permission to any such taxpayer upon application therefor to change from one basis to another under such rules and regulations. A utility shall report its sales on an accrual basis. A sale by a utility of electricity, piped natural gas, or intrastate telephone service is considered to accrue when the utility bills its customer for the sale. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1983 (Reg. Sess., 1984), c. 1097, s. 15.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, inserted "except a utility" following "Any retailer" at the beginning of the first sentence and added the last two sentences.

§ 105-164.21. Discount for payment of taxes when due.

(a) Except as provided in subsection (b), a retailer who pays the retail sales or use tax imposed by this Article shall be entitled to deduct from the amount of the tax for which he is liable and which he actually pays a discount of three percent (3%). Provided, however, the Secretary may deny a taxpayer the benefits of this section for failure to pay the full tax when due as well as in cases of fraud, evasion, failure to keep accurate and clear records as hereinafter required. Provided, further, that in order to receive the discount the taxpayer must deduct the three percent (3%) at the time of making his monthly or quarterly remittance of tax to the Department of Revenue.

(b) A utility may not deduct the discount provided in subsection (a) on sales of electricity, piped natural gas, or intrastate telephone service. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1983 (Reg. Sess., 1984), c. 1097, s. 8.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, designated the first paragraph as subsection (a), substituted "Except as provided in subsection (b), a retailer" for "Every retailer" at the beginning of the first sentence of subsection (a), and added subsection (b).

§ 105-164.21A. Deduction for municipalities that sell electric power.

A municipality that pays the retail sales tax imposed by this Article on electricity may deduct from the amount of tax payable by the municipality an amount equal to three percent (3%) of the difference between its gross receipts from sales of electricity for the preceding quarter and the amount paid by the municipality for purchased power and related services during that quarter. (1983 (Reg. Sess., 1984), c. 1097, s. 12.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1097, s. 17, makes this section effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date.

Division VIII. Administration and Enforcement.

§ 105-164.44B. Transfer to Wildlife Resources Fund of taxes on hunting and fishing supplies and equipment.

The estimated amount of State sales and use taxes collected on hunting and fishing supplies and equipment for fiscal year 1985-86 is two million dollars ($2,000,000). This amount shall be used to determine the amount of sales and use tax collections transferred by the Secretary of Revenue to the State Treasurer for the Wildlife Resources Fund. During fiscal year 1985-86 the Secretary of Revenue shall transfer one-twelfth of two million dollars ($2,000,000) each

month to the State Treasurer for the Wildlife Resources Fund. During following fiscal years the Secretary of Revenue shall transfer one-twelfth of two million dollars ($2,000,000) each month to the State Treasurer for the Wildlife Resources Fund, plus or minus the percentage of that amount by which the total collection of State sales and use taxes increased or decreased during the preceding fiscal year. (1983 (Reg. Sess., 1984), c. 1116, s. 88.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 119, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 88(c), provides:

"All of the funds collected by the Secretary of Revenue and transferred to the North Carolina Wildlife Resources Commission pursuant to this section shall be obligated and expended by the Commission in accordance with Article 1 of Chapter 143 of the North Carolina General Statutes. Of the additional financial support generated annually by the provisions of this section for the Wildlife Commission, an amount not less than fifty percent (50%) shall be obligated and expended by the Commission annually for capital improvements and other nonrecurring purposes."

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115 is a severability clause.

ARTICLE 6.

Schedule G. Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.

(d) Gifts not exceeding a total value of ten thousand dollars ($10,000) made to any one donee in a calendar year are not taxable under this Article. When gifts exceeding a total value of ten thousand dollars ($10,000) are made to any one donee in a calendar year, only the portion of the gifts exceeding ten thousand dollars ($10,000) in value is taxable under this Article. This exclusion does not apply to gifts of future interests in property. For the purposes of determining the exclusion herein provided, no part of a gift to an individual, or in trust for an individual, who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property if the property and the income therefrom may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and will to the extent not so expended pass to the donee on his attaining the age of 21 years, and in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment.

When a gift is made by one spouse to a person other than the donor's spouse, the donor may claim both the donor's annual exclusion and the spouse's annual exclusion provided that both spouses consent.

(1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6; 1957, c. 1340, s. 6; 1973, c. 505; c. 1287, s. 9; 1983, c. 685, s. 1; 1983 (Reg. Sess., 1984), c. 1023, s. 1; c. 1024.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1023, effective June 28, 1984, and applicable to gifts and transfers made on or after January 1, 1985, substituted the present first through third sentences of subsection (d) for the former first and second sentences thereof.

The 1983 (Reg. Sess., 1984) amendment by c. 1024, effective June 28, 1984, and applicable to gifts made on or after January 1, 1985, added the second paragraph of subsection (d).

ARTICLE 7.

Schedule H. Intangible Personal Property.

§ 105-212. Institution exempted; conditional and other exemptions.

CASE NOTES

"Distributable," as used in this section, means capable of being distributed. Dickson v. Lynch, — N.C. App. —, 310 S.E.2d 404 (1984).

Purpose of the exemption in this section is to dispel any idea that intangibles otherwise exempt would be subject to the intangible personal property tax because a fiduciary domiciled in this State held and controlled such intangibles. Dickson v. Lynch, — N.C. App. —, 310 S.E.2d 404 (1984).

ARTICLE 9.

Schedule J. General Administration; Penalties and Remedies.

§ 105-236. Penalties.

Legal Periodicals. —
For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-241.1. Additional taxes; assessment procedure.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-259. Secrecy required of officials; penalty for violation.

With respect to any one of the following persons: (i) the Secretary of Revenue and all other officers or employees, and former officers and employees, of the Department of Revenue; (ii) local tax authorities (as defined in G.S. 105-289(e)) and former local tax authorities; (iii) any other person authorized in this section to receive information concerning any item contained in any report or return, or authorized to inspect any report or return; and (iv) the Commissioner of Insurance and all other officers or employees and former officers and employees of the Department of Insurance with respect to State and federal income tax returns filed with the Commissioner of Insurance by domestic insurance companies; and except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for any of said persons to divulge or make known in any manner the amount of income, income tax or other taxes of any taxpayer, or information relating thereto or from which the amount of income, income tax or other taxes or any part thereof might be determined, deduced or estimated, whether the same be set forth or disclosed in or by means of any report or return required to be filed or furnished under this Subchapter, or in or by means of any audit, assessment, application, correspondence, schedule or other document relating to such taxpayer,

notwithstanding the provisions of Chapter 132 of the General Statutes or of any other law or laws relating to public records. It shall likewise be unlawful to reveal whether or not any taxpayer has filed a return, and to abstract, compile or furnish to any person, firm or corporation not otherwise entitled to information relating to the amount of income, income tax or other taxes of a taxpayer, any list of names, addresses, social security numbers or other personal information concerning such taxpayer, whether or not such list discloses a taxpayer's income, income tax or other taxes, or any part thereof, except that when an election is made by a husband and wife under G.S. 105-152(e) to file their separate returns on a single form, or in order to determine an exemption allowable under G.S. 105-149(a)(2), any information given to one spouse concerning the income or income tax of the other spouse reported or reportable on such single return or on separate returns shall not be a violation of the provisions of this section.

Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, or their duly authorized representative; or the inspection by a legal representative of the State of the report or return of any taxpayer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this Subchapter; nor shall the provisions of this section prohibit the Department of Revenue furnishing information to other governmental agencies of persons and firms properly licensed under Schedule B, G.S. 105-33 to 105-113. The Department of Revenue may exchange information with the officers of organized associations of taxpayers under Schedule B, G.S. 105-33 to 105-113, with respect to parties liable for such taxes and as to parties who have paid such license taxes.

When any record of the Department of Revenue shall have been photographed, photocopied or microphotocopied pursuant to the authority contained in G.S. 8-45.3, the original of said record may thereafter be destroyed at any time upon the order of the Secretary of Revenue, notwithstanding the provisions of G.S. 121-5, G.S. 132-3 or any other law or laws relating to the preservation of public records. Any record which shall not have been so photographed, photocopied or microphotocopied shall be preserved for three years, and thereafter until the Secretary of Revenue shall order the same to be destroyed.

Any person, officer, agent, clerk, employee, local tax authority or former officer, employee or local tax authority violating the provisions of this section shall be guilty of a misdemeanor and fined not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000) and/or imprisoned, in the discretion of the court; and if such offending person be a public officer or employee, he shall be dismissed from such office or employment, and shall not hold any public office or employment in this State for a period of five years thereafter.

Notwithstanding the provisions of this section, the Secretary of Revenue may permit the Commissioner of Internal Revenue of the United States, or the revenue officer of any other state imposing any of the taxes imposed in this Subchapter, or the duly authorized representative of either, to inspect the report or return of any taxpayer; or may furnish such officer or his authorized agent an abstract of the report or return of any taxpayer; or supply such officer with information concerning any item contained in any report or return, or disclosed by the report of any investigation of such report or return of any taxpayer. Such permission, however, shall be granted or such information furnished to such officer, or his duly authorized representatives, only if the statutes of the United States or of such other state grants substantially similar

privilege to the Secretary of Revenue of this State or his duly authorized representative. Notwithstanding contrary provisions of this section, the Secretary may also furnish to the Employment Security Commission account and identification numbers, and names and addresses, of taxpayers when said Commission requires such information for the purpose of administering Chapter 96 of the General Statutes. Neither this section nor any other law prevents the exchange of information between the Department of Revenue and the Department of Transportation's Division of Motor Vehicles when the information is needed by either to administer the laws with which they are charged. Notwithstanding any other provision of law, State officers and employees who perform computerized data processing functions pursuant to G.S. 143-341(9) for the Department of Revenue are authorized to receive and process for the Department of Revenue information in reports and returns and are subject to the criminal provisions of this section.

Notwithstanding the provisions of this section, the Secretary of Revenue may contract with any person, firm or corporation to receive and address, sort, bag, or deliver to the United States Postal Service any bulk mailing originated by the Department of Revenue, and may deliver the mail to the contractor pursuant to the contract. To ensure performance of the contract, the contractor shall furnish a bond in a form and amount acceptable to the Secretary. (1939, c. 158, s. 928; 1951, c. 190, s. 2; 1973, c. 476, s. 193; c. 903, s. 4; c. 1287, s. 13; 1975, c. 19, s. 29; c. 275, s. 7; 1977, c. 657, s. 6; 1979, c. 495; 1983, c. 7; 1983 (Reg. Sess., 1984), c. 1004, s. 3; c. 1034, s. 125.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1004, s. 3, effective June 28, 1984, substituted the next-to-last sentence of the next-to-last paragraph for a former last sentence, which read "Nothing in this section or any other laws shall prevent the exchange of information between the Department of Revenue and the Department of Motor Vehicles when such information is needed by either or both of said departments for the purpose of properly enforcing the laws with the administration of which either or both of said departments is charged."

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 125, effective July 1, 1984, added the last sentence of the next-to-last paragraph.

§ 105-267.1. Refund of taxes illegally collected and paid into State treasury.

Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount legally due the State, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment, unless a demand is made for a refund of income tax that was erroneously paid this State and is payable to another state. (Ex. Sess. 1921, c. 96; C.S., s. 7979(a); 1971, c. 806, s. 2; 1983, c. 913, s. 12; 1983 (Reg. Sess., 1984), c. 1034, s. 126.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added "unless a demand is made for a refund of income tax that was erroneously paid this State and is payable to another state" at the end of this section.

§ 105-269. Extraterritorial authority to enforce payment.

(a) The Secretary of Revenue, with the assistance of the Attorney General, is hereby empowered to bring suits in the courts of other states to collect taxes legally due this State. The officials of other states which extend a like comity to this State are empowered to sue for the collection of such taxes in the courts of this State. A certificate by the Secretary of State, under the Great Seal of the State, that such officers have authority to collect the tax shall be conclusive evidence of such authority. Whenever it shall be deemed expedient by the Secretary of Revenue to employ local counsel to assist in bringing suit in an out-of-state court, the Secretary, with the concurrence of the Attorney General, may employ such local counsel on the basis of a negotiated retainer or in accordance with prevailing commercial law league rates.

(b) The Secretary of Revenue may, in accordance with the procedure prescribed in G.S. 143-49(3), contract for the collection of taxes legally due this State from taxpayers located in other states. The Secretary may furnish to a contractor hired pursuant to this subsection any information he considers necessary to identify and locate a taxpayer, establish the tax liability of a taxpayer, or effect collection of the amount due. (1939, c. 158, s. 939; 1963, c. 1169, s. 6; 1973, c. 476, s. 193; 1983 (Reg. Sess., 1984), c. 1005.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, designated the first paragraph as subsection (a) and added subsection (b).

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

ARTICLE 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.

CASE NOTES

Applied in Cleland v. Children's Home, Inc., 64 N.C. App. 153, 306 S.E.2d 587 (1983).

§ 105-275. Property classified and excluded from the tax base.

The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

(6) Special nuclear materials held for or in the process of manufacture, processing, or delivery by the manufacturer or processor thereof, regardless whether the manufacturer or processor owns the special nuclear materials. The terms "manufacture" and "processing" do not include the use of special nuclear materials as fuel. The term "special nuclear materials" includes (i) uranium 233, uranium enriched in the

isotope 233 or in the isotope 235; and (ii) any material artificially enriched by any of the foregoing, but not including source material. "Source material" means any material except special nuclear material which contains by weight one twentieth of one percent (0.05%) or more of (i) uranium, (ii) thorium, or (iii) any combination thereof. Provided however, that to qualify for this exemption no such nuclear materials shall be discharged into any river, creek or stream in North Carolina. The classification and exclusion provided for herein shall be denied to any manufacturer, fabricator or processor who permits burial of such material in North Carolina or who permits the discharge of such nuclear materials into the air or into any river, creek or stream in North Carolina if such discharge would contravene in any way the applicable health and safety standards established and enforced by the Department of Human Resources, the North Carolina Department of Natural Resources and Community Development, or the Federal Atomic Energy Commission. The most stringent of these standards shall govern.

(8) a. Real and personal property that is used or, if under construction, is to be used exclusively for air cleaning or waste disposal or to abate, reduce, or prevent the pollution of air or water (including, but not limited to, waste lagoons and facilities owned by public or private utilities built and installed primarily for the purpose of providing sewer service to areas that are predominantly residential in character or areas that lie outside territory already having sewer service), if the [Department of Natural Resources and Community Development] furnishes a certificate to the tax supervisor of the county in which the property is situated or to be situated stating that the Environmental Management Commission has found that the described property:

1. Has been or will be constructed or installed;
2. Complies with or that plans therefor which have been submitted to the Environmental Management Commission indicate that it will comply with the requirements of the Environmental Management Commission;
3. Is being effectively operated or will, when completed, be required to operate in accordance with the terms and conditions of the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission; and
4. Has or, when completed, will have as its primary rather than incidental purpose the reduction of water pollution resulting from the discharge of sewage and waste or the reduction of air pollution resulting from the emission of air contaminants.

b. Real or personal property that is used or, if under construction, is to be used exclusively for recycling or resource recovering of or from solid waste, if the Department of Human Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Human Resources has found that the described property has been or will be constructed or installed, complies or will comply with the regulations of the Department of Human Resources, and has, or will have as its primary purpose recycling or resource recovering of or from solid waste.

c. Tangible personal property that is used exclusively, or if being installed, is to be used exclusively, for the prevention or reduction of cotton dust inside a textile plant for the protection of the health

of the employees of the plant, in accordance with occupational safety and health standards adopted by the State of North Carolina pursuant to Article 16 of G.S. Chapter 95. The Department of Revenue shall adopt guidelines to assist the tax supervisors in administering this exclusion.

(1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973, cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2; 1983, c. 643, ss. 1, 2; c. 693; 1983 (Reg. Sess., 1984), c. 1060.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. —

Subdivision (8) of this section is set out above to correct an error in the 1983 Cumulative Supplement.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted the present first and second sentences of subdivision (6) for a former first sentence thereof, which read "Special nuclear materials in any form being held by the manufacturer, fabricator, or processor (whether or not the owner thereof) for the purpose of or in the process of manufacture, fabrication, processing or delivery."

Legal Periodicals. —

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

Article 13.

Standards for Appraisal and Assessment.

§ 105-283. Uniform appraisal standards.

CASE NOTES

Stated in In re Colonial Pipeline Co., — N.C. App. —, 313 S.E.2d 819 (1984).

Article 14.

Time for Listing and Appraising Property for Taxation.

§ 105-285. Date as of which property is to be listed and appraised.

CASE NOTES

Legislature inadvertently omitted a comma between the words "mercantile" and "manufacturing" in subsection (c) of this section when the statute was revised. In re Mitchell-Carolina Corp., — N.C. App. —, 313 S.E.2d 816 (1984).

Stated in Arkansas-Best Freight Sys. v. Lynch, 723 F.2d 365 (4th Cir. 1983).

Cited in Cleland v. Children's Home, Inc., 64 N.C. App. 153, 306 S.E.2d 587 (1983).

§ 105-286. Time for general reappraisal of real property.

CASE NOTES

Stated in Arkansas-Best Freight Sys. v. Lynch, 723 F.2d 365 (4th Cir. 1983).

ARTICLE 16.

County Listing, Appraisal, and Assessing Officials.

§ 105-294. County tax supervisor.

(a) Appointment. — Persons occupying the position of county assessor on July 1, 1983, shall continue in office until the first Monday in July, 1983. At its first regular meeting in July, 1983, and every two years or four years thereafter, as appropriate, the board of county commissioners of each county shall appoint a county assessor to serve a term of not less than two nor more than four years; provided, however, that no person shall be eligible for initial appointment to a term of more than two years unless such person is deemed to be qualified as provided in subsection (b) of this section or has been certified by the Department of Revenue as provided in subsection (c) of this section. The board of commissioners may remove the assessor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the board. Whenever a vacancy occurs in this office, the board of county commissioners shall appoint a qualified person to serve as county assessor for the period of the unexpired term.

(1939, c. 310, ss. 400, 401; 1953, c. 970, ss. 1, 2; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1983, c. 813, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (a) of this section is set out above to insert a comma that was inadvertently omitted in the proviso in the second sentence.

ARTICLE 19.

Administration of Real and Personal Property Appraisal.

§ 105-317.1. Appraisal of personal property; elements to be considered.

CASE NOTES

Stated in In re Mitchell-Carolina Corp., — N.C. App. —, 313 S.E.2d 816 (1984).

ARTICLE 23.

Public Service Companies.

§ 105-333. Definitions.

CASE NOTES

Stated in In re Colonial Pipeline Co., — N.C. App. —, 313 S.E.2d 819 (1984).

§ 105-334. Duty to file report; penalty for failure to file.

CASE NOTES

Stated in In re Colonial Pipeline Co., — N.C. App. —, 313 S.E.2d 819 (1984).

§ 105-335. Appraisal of property of public service companies.

Legal Periodicals. —
For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

Personal property (rolling stock) of motor carriers may tax at a higher ratio of true market value than commercial and industrial real property. Arkansas-Best Freight Sys. v. Lynch, 723 F.2d 365 (4th Cir. 1983).

Stated in In re Colonial Pipeline Co., — N.C. App. —, 313 S.E.2d 819 (1984).

§ 105-336. Methods of appraising certain properties of public service companies.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

Applied in In re Colonial Pipeline Co., — N.C. App. —, 313 S.E.2d 819 (1984).

§ 105-337. Apportionment of taxable values to this State.

CASE NOTES

Stated in In re Colonial Pipeline Co., — N.C. App. —, 313 S.E.2d 819 (1984).

Article 24.

Review and Enforcement of Orders.

§ 105-345.2. Record on appeal; extent of review.

CASE NOTES

Cited in In re Colonial Pipeline Co., — N.C. App. —, 313 S.E.2d 819 (1984).

Article 26.

Collection and Foreclosure of Taxes.

§ 105-356. Priority of tax liens.

CASE NOTES

Applied in In re Taxes of Bob Dance Chevrolet, — N.C. App. —, 313 S.E.2d 207 (1984).

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.

(a) All taxes levied by counties and municipalities under the provisions of this Subchapter shall be due and payable on the first day of September of the fiscal year for which the taxes are levied. If paid:

(1) On or after the due date and before the sixth day of January thereafter, taxes shall be paid at par or face amount.

(2) On or after the sixth day of January following the due date and before the first day of February thereafter, there shall be added to the taxes interest at the rate of two percent (2%).

(3) On or after the first day of February following the due date, there shall be added to the taxes, in addition to the two percent (2%) provided in subdivision (a)(2), above, interest at the rate of three fourths of one percent (¾%) per month or fraction thereof until the taxes plus penalties and interest have been paid.

(1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1; 1969, c. 921, s. 1; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1977, c. 327, s. 2; c. 630; 1979, c. 233, §§ 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Local Modification. — Lincoln County: 1983 (Reg. Sess., 1984), c. 958.

Editor's Note. — Subsection (a) of this section is set out above to correct an error in subdivision (a)(1) as set out in the Replacement Volume.

CASE NOTES

Stated in Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571 (1983).

Cited in Bradbury v. Cummings, — N.C. App. —, 314 S.E.2d 568 (1984).

§ 105-368. Procedure for attachment and garnishment.

CASE NOTES

To require the bank to establish priority by exercising the right to setoff before receiving notice of attachment would necessitate the senseless practice of requiring a garnishee bank to anticipate which accounts might potentially be attached in order to avoid losing its right to the property upon receipt of notice of attachment. In re Taxes of Bob Dance Chevrolet, — N.C. App. —, 313 S.E.2d 207 (1984).

OPINIONS OF ATTORNEY GENERAL

Home addresses of State employees may be obtained by ad valorem tax collectors pursuant to subsection (i) of this section. See opinion of Attorney General to Dr. Sarah T. Morrow, Secretary, Department of Human Resources, 52 N.C.A.G. 85 (1983).

§ 105-369. Advertisement of tax liens on real property for failure to pay taxes.

(a) Report of unpaid Taxes that are Liens on Real Property. — On the first Monday in February in each year, each county tax collector and on the second Monday in February in each year, each municipal tax collector shall report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property, and the governing body shall thereupon order the tax collector to advertise such tax liens. For purposes of this section, district taxes collected by county tax collectors shall be regarded as county taxes and district taxes collected by municipal tax collectors shall be regarded as municipal taxes.

(b) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1013, effective January 1, 1985.

(c) Time and Contents of Advertisement. — The county tax collector shall advertise county tax liens by posting a notice of the liens at the county courthouse and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. The municipal tax collector shall advertise municipal tax liens by posting a notice of the liens at the city or town hall and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. Advertisements of tax liens shall be made during the period March 1 through June 30. The costs of newspaper advertising shall be paid by the taxing unit. (If the taxes of two or more taxing units are collected by the same tax collector, the tax liens of each unit shall be advertised separately unless, under the provisions of a special act or contractual agreement between the taxing units, joint advertisement is permitted.)

The posted notice and newspaper advertisement shall set forth the following information:

(1) The name of each person to whom is listed real property on which the taxing unit has a lien for unpaid taxes, together with a brief description of each parcel of land to which such a lien has attached and a statement of the principal amount of the taxes constituting a lien against the parcel.

(2) A statement that the amounts advertised will be increased by interest and costs and that the omission of interest and costs from the amounts advertised will not constitute waiver of the taxing unit's claim for those items.

(3) In the event the list of tax liens has been divided for purposes of advertisement in more than one newspaper, a statement of the names of all newspapers in which advertisements will appear and the dates on which they will be published.

(4) A statement that the taxing unit may foreclose the tax liens and sell the real property subject to the liens in satisfaction of its claim for taxes.

Failure to comply with this subsection does not affect the validity of the taxes or tax liens.

(e) Payments during Advertising Period. — At any time during the advertisement period, any parcel may be withdrawn from the list by payment of the taxes plus interest that has accrued to the time of payment and a proportionate part of the advertising fee to be determined by the tax collector. Thereafter, the tax collector shall delete that parcel from any subsequent advertisement, but if he fails to do so he shall not be liable for his failure to make the deletion.

(1939, c. 310, s. 1715; 1955, c. 993; 1971, c. 806, s. 1; 1983, c. 808, s. 1; 1983 (Reg. Sess., 1984), c. 1013.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, deleted "at one of the times specified in subsection (b), below" at the end of the first sentence of subsection (a), deleted subsection (b), relating to the time for advertisement, in subsection (c) inserted "Time and" at the beginning of the heading, substituted the present first through third sentences of the first paragraph for a former first sentence relating to advertisement of tax liens, and added the last paragraph, and in subsection (e) substituted "any subsequent advertisement" for "the advertisement" and "deletion" for "decision" in the last sentence.

§ 105-373. Settlements.

(a) Annual Settlement of Tax Collector. —

(1) Preliminary Report. — Not later than the third Monday in June, the tax collector shall make a sworn report to the governing body of the taxing unit showing:

a. A list of the persons owning real property whose taxes remain unpaid and the principal amount due; and

b. A list of the persons not owning real property whose personal property taxes remain unpaid. (To this list the tax collector shall append his statement under oath that he has made diligent efforts to collect the taxes due from the persons listed out of their personal property and by other means available to him for collection, and he shall report such other information concerning these taxpayers as may be of interest to or required by the governing body, including a report of his efforts to make collection outside the taxing unit under the provisions of G.S. 105-364.) The governing body of the taxing unit may publish this list in any newspaper in the taxing unit. The cost of publishing this list shall be paid by the taxing unit.

(2) Insolvents. — Upon receiving the report required by subdivision (a)(1), above the governing body of the taxing unit shall enter upon its minutes the names of persons owing taxes (but who listed no real property) whom it finds to be insolvent, and it shall by resolution designate the list entered in its minutes as the insolvent list to be credited to the tax collector in his settlement.

(3) Settlement for Current Taxes. — On the first Monday of July the tax collector shall make full settlement with the governing body of the taxing unit for all taxes in his hands for collection for the preceding fiscal year. In the settlement the tax collector shall be charged with:

a. The total amount of all taxes in his hands for collection for the year, including amounts originally charged to him and all amounts subsequently charged on account of discoveries;

b. All penalties, interest, and costs collected by him in connection with taxes for the current year; and

c. All other sums collected by him.

The tax collector shall be credited with:

a. All sums representing taxes for the year deposited by him to the credit of the taxing unit or receipted for by a proper official of the unit;

b. Releases duly allowed by the governing body;

c. The principal amount of taxes constituting liens on real property;

d. The principal amount of taxes included in the insolvent list determined in accordance with subdivision (a)(2), above;

e. Discounts allowed by law; and

f. Commissions (if any) lawfully payable to the tax collector as compensation.

The tax collector shall be liable on his bond for both honesty and faithful performance of duty; for any deficiencies; and, in addition, for all criminal penalties provided by law.

The settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of the governing body.

(4) Disposition of Tax Receipts after Settlement. — Uncollected taxes allowed as credits in the settlement prescribed in subdivision (a)(3), above, whether represented by tax liens held by the taxing unit or included in the list of insolvents, shall, for purposes of collection, be recharged to the tax collector or charged to some other person designated by the governing body of the taxing unit under statutory authority. The person charged with uncollected taxes shall:

a. Give bond satisfactory to the governing body;

b. Receive the tax receipts and tax records representing the uncollected taxes;

c. Have and exercise all powers and duties conferred or imposed by law upon tax collectors; and

d. Receive compensation as determined by the governing body.

(1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1; 1983, c. 670, s. 22; c. 808, ss. 5-7.)

Only Part of Section Set Out. — As the rest of the section was not affected it is not set out.

Editor's Note. —

Subsection (a) of this section is set out to correct an error in subdivision (a)(3) as set out in the 1983 Cumulative Supplement.

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

CASE NOTES

Cited in Bradbury v. Cummings, — N.C. App. —, 314 S.E.2d 568 (1984).

§ 105-378. Limitation on use of remedies.

CASE NOTES

The Legislature did not intend for taxing units to assign barred claims to individuals who would then serve as collection agents for the taxing unit and thereby circumvent the limitation placed on the taxing units by this section. Bradbury v. Cummings, — N.C. App. —, 314 S.E.2d 568 (1984).

Private Holders of Tax Lien Sale Certificates. — Although private holders of tax lien sale certificates are not mentioned in this section, the statute nevertheless applies to private holders. Bradbury v. Cummings, — N.C. App. —, 314 S.E.2d 568 (1984).

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-436.1. Taxation of alcohol fuels.

(a) Sale, distribution, or use of a blend of motor fuel and a minimum of ten percent (10%) anhydrous ethanol is subject to the tax described in G.S. 105-434 except:

(1) From July 1, 1981, through June 30, 1982, the tax is nine cents (9¢);

(2) From July 1, 1982, through June 30, 1983, the tax is ten cents (10¢);

(3) From July 1, 1983, through June 30, 1984, the tax is eleven cents (11¢);

(4) From July 1, 1985, through June 30, 1992, the tax is seven cents (7¢).

Quarterly refunds and rebates allowed under this Article for the purchase of such a blend shall not exceed the motor fuels tax on that blend reduced by one cent (1¢). Annual refunds and rebates allowed under this Article for the purchase of such a blend shall be at the following rates: for the year ending December 31, 1981, six cents (6¢) per gallon; for the year ending December 31, 1982, eight and one-half cents (8½¢) per gallon; for the year ending December 31, 1983, nine and one-half cents (9½¢) per gallon; for the year ending December 31, 1984, ten and one-half cents (10½¢) per gallon; for the year ending December 31, 1985, eight and one-half cents (8½¢) per gallon; for subsequent calendar years ending on or before December 31, 1991, six cents (6¢) per gallon; for the year ending December 31, 1992, eight and one-half cents (8½¢) per gallon.

(1979, 2nd Sess., c. 1187, s. 1; 1981, c. 690, s. 1; 1983, c. 591, s. 1; 1983 (Reg. Sess., 1984), c. 1003, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c.

591, s. 4, and Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 2, provides: "Sec. 6. This act shall become effective on January 1, 1981, and shall expire on January 1, 1993. No liability for the tax levied under this act before its expiration is discharged as a result of the expiration, and no right to a refund that accrued before the act's expiration may be denied because of the expiration."

Session Laws 1983, c. 760, s. 2, as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 3, provides: "Notwithstanding G.S. 105-436.1(a) and G.S. 105-449.24 the annual refunds and rebates for the blends described in Section 1 of this act shall be at the following rates: For the year ending December 31, 1983, eight and one-half cents (8½¢); for the years ending December 31, 1984, and December 31, 1985, six cents (6¢)."

Session Laws 1983, c. 760, s. 4, as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 4, provides: "This act is effective upon ratification and expires on December 31, 1985. No liability for the tax levied under this act before its expiration is discharged as a result of the expiration, and no right to a refund that accrued before the act's expiration may be denied because of the expiration."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, substituted "for subsequent calendar years ending on or before December 31, 1991, six cents (6¢) per gallon; for the year ending December 31, 1992, eight and one-half cents (8½¢) per gallon" for "for subsequent years ending December 31, six cents (6¢) per gallon" at the end of subsection (a).

§ 105-446.3:1. Refund of taxes paid on gasohol.

Editor's Note. —

Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c. 591, s. 4, and Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 2, provides: "Sec. 6. This act shall become effective on January 1, 1981, and shall expire on January 1, 1993. No liability for the tax levied under this act before its expiration is discharged as a result of the expiration, and no right to a refund that accrued before the act's expiration may be denied because of the expiration."

§ 105-446.5. Refund of taxes paid on motor fuels used by concrete mixing vehicles and solid waste compacting vehicles.

(a) Refund. — Any person who purchases and uses motor fuels in a concrete mixing vehicle or a solid waste compacting vehicle shall be reimbursed at the rate of thirty-three and one-third percent (33-$^1/_3$%) of eleven cents (11¢) per gallon of the tax levied under this Article for the motor fuels tax paid on the amount of fuel consumed by the vehicle in its mixing or compacting operations, as distinguished from propelling the vehicle.

(b) Application. — Application for reimbursement for the preceding calendar year shall be filed with the Secretary of Revenue on or before April 15th. The application shall state whether or not the applicant has filed a North Carolina income tax return for the preceding taxable year, and shall state that the applicant has paid for the fuel for which a refund is claimed or that payment for the fuel has been secured to the seller's satisfaction. Applications filed with the Secretary within six months of the date the return is due shall be accepted, but the amount of the refund shall be reduced by twenty-five percent (25%) if the application is filed within 30 days after the date the return is due, and shall be reduced by fifty percent (50%) if the application is filed more than 30 days but less than six months after the date the return is due.

(c) Administration. — If the Secretary of Revenue determines that an application for refund is correct, he shall issue the applicant a warrant upon the State Treasurer for the amount of the refund. If the Secretary determines that an application for refund is incorrect, he shall send notice of his determination to the applicant, which notice shall state a time and place for a hearing. If, upon

holding the hearing, the Secretary finds the applicant has collected or sought to collect a refund for fuel used to propel a vehicle, he shall reject the application in its entirety, and the applicant shall be required to pay back all taxes refunded to him on the basis of the rejected application. The applicant may seek review of the Secretary's decision under G.S. 105-241.2, 105-241.3 and 105-241.4. (1979, c. 801, s. 92; 1981, c. 690, s. 1; 1983 (Reg. Sess., 1984), c. 1025.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, and applicable to taxes on motor fuel purchased on or after January 1, 1984, rewrote this section.

§ 105-446.6. Refund on taxpaid motor fuel transported to another state.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-449.01: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1004, s. 1, effective June 28, 1984.

Article 36A.

Special Fuels Tax.

§ 105-449.16. Levy of tax; purposes; special provisions for gasohol and nonanhydrous ethanol.

Editor's Note. — Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c. 591, s. 4, and Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 2, provides: "Sec. 6. This act shall become effective on January 1, 1981, and shall expire on January 1, 1993. No liability for the tax levied under this act before its expiration is discharged as a result of the expiration, and no right to a refund that accrued before the act's expiration may be denied because of the expiration."

Session Laws 1983, c. 760, s. 2, as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 3, provides: "Notwithstanding G.S. 105-436.1(a) and G.S. 105-449.24 the annual refunds and rebates for the blends described in Section 1 of this act shall be at the following rates: For the year ending December 31, 1983, eight and one-half cents (8½¢); for the years ending December 31, 1984, and December 31, 1985, six cents (6¢)."

Session Laws 1983, c. 760, s. 4, as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 4, provides: "This act is effective upon ratification and expires on December 31, 1985. No liability for the tax levied under this act before its expiration is discharged as a result of the expiration, and no right to a refund that accrued before the act's expiration may be denied because of the expiration."

§ 105-449.24. Exemptions, rebates and refunds.

The provisions of G.S. 105-439, 105-446.1, 105-446.3, 105-446.3:1, 105-446.5 and 105-449 relating to exemption from, and rebates and refunds of tax levied on gasoline shall also apply to the taxes levied by this Article on special fuels. Quarterly refunds and rebates allowed under this Article for the purchase of a blend of gasoline or fuel and a minimum of ten percent (10%) anhydrous ethanol shall not exceed the motor fuels tax on that blend reduced by one cent (1¢). Annual refunds and rebates allowed under this Article for the purchase

of such a blend shall be at the following rates: for the year ending December 31, 1981, six cents (6¢) per gallon; for the year ending December 31, 1982, eight and one-half cents (8½¢) per gallon; for the year ending December 31, 1983, nine and one-half cents (9½¢) per gallon; for the year ending December 31, 1984, ten and one-half cents (10½¢) per gallon; for the year ending December 31, 1985, eight and one-half cents (8½¢) per gallon; for subsequent calendar years ending on or before December 31, 1991, six cents (6¢) per gallon; for the year ending December 31, 1992, eight and one-half cents (8½¢) per gallon. (1967, c. 1110, s. 15; 1971, c. 1221, s. 2; 1979, c. 801, s. 93; 1979, 2nd Sess., c. 1187, ss. 4, 5; 1981, c. 690, s. 2; 1983, c. 591, s. 3; 1983 (Reg. Sess., 1984), c. 1003, s. 1.)

Editor's Note. —

Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c. 591, s. 4, and Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 2, provides: "Sec. 6. This act shall become effective on January 1, 1981, and shall expire on January 1, 1993. No liability for the tax levied under this act before its expiration is discharged as a result of the expiration, and no right to a refund that accrued before the act's expiration may be denied because of the expiration."

Session Laws 1983, c. 760, s. 2, as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 3, provides: "Notwithstanding G.S. 105-436.1(a) and G.S. 105-449.24 the annual refunds and rebates for the blends described in Section 1 of this act shall be at the following rates: For the year ending December 31, 1983, eight and one-half cents (8½¢); for the years ending December 31, 1984, and December 31, 1985, six cents (6¢)."

Session Laws 1983, c. 760, s. 4, as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1003, s. 4, provides: "This act is effective upon ratification and expires on December 31, 1985. No liability for the tax levied under this act before its expiration is discharged as a result of the expiration, and no right to a refund that accrued before the act's expiration may be denied because of the expiration."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, substituted "for subsequent calendar years ending on or before December 31, 1991, six cents (6¢) per gallon; for the year ending December 31, 1992, eight and one-half cents (8½¢) per gallon" for "for subsequent years ending December 31, six cents (6¢) per gallon" at the end of the section.

§ 105-449.36: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1004, s. 1, effective June 28, 1984.

Article 36B.

Tax on Carriers Using Fuel Purchased Outside State.

§ 105-449.55. Commissioner of Motor Vehicles to aid in enforcing Article.

The Commissioner of Motor Vehicles may utilize the State Highway Patrol, uniform officers assigned to permanent weighing stations of the Division of Motor Vehicles, Department of Transportation, and other appropriate personnel in the Division of Motor Vehicles to assist the Department of Revenue in enforcing this Article. (1955, c. 823, s. 19; 1983 (Reg. Sess., 1984), c. 1004, s. 4.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, rewrote this section, which formerly read "The Commissioner of Motor Vehicles is hereby authorized and directed to utilize the State Highway Patrol, uniformed officers assigned to the various permanent weighing stations of the Department of Motor Vehicles, and such other personnel of the Department of Motor Vehicles as he may deem wise, to assist in enforcing the provisions of this Article."

§ 105-449.56. Enforcement powers of weigh station officers of Motor Vehicles Division.

The uniformed officers assigned to the various permanent weighing stations of the Division of Motor Vehicles shall, in addition to the powers set out in G.S. 20-183.10, have the powers of peace officers, including the power of making arrests, serving process, and appearing in court, in all matters and things relating to this Article and the administration and enforcement thereof. (1955, c. 823, s. 20; 1983 (Reg. Sess., 1984), c. 1004, s. 5.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, substituted "Division" for "Department" and amended the catchline.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

ARTICLE 39.

Local Government Sales and Use Tax.

§ 105-467. Sales tax imposed; limited to items on which the State now imposes a three percent sales tax.

The sales tax which may be imposed under this Article is limited to a tax at the rate of one percent (1%) of:

(1) The sales price of those articles of tangible personal property now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(1);

(2) The gross receipts derived from the lease or rental of tangible personal property where the lease or rental of such property is an established business now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(2);

(3) The gross receipts derived from the rental of any room or lodging furnished by any hotel, motel, inn, tourist camp or other similar accommodations now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(3); and

(4) The gross receipts derived from services rendered by laundries, dry cleaners, cleaning plants and similar type businesses now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(4).

The sales tax authorized by this Article does not apply to sales by a utility of electricity, piped natural gas, or intrastate telephone service.

The exemptions and exclusions contained in G.S. 105-164.13 and the refund provisions contained in G.S. 105-164.14 shall apply with equal force and in like manner to the local sales and use tax authorized to be levied and imposed under this Article. A taxing county shall have no authority, with respect to the local sales and use tax imposed under this Article to change, alter, add to or delete any refund provisions contained in G.S. 105-164.14, or any exemptions or exclusions contained in G.S. 105-164.13 or which are elsewhere provided for.

The local sales tax authorized to be imposed and levied under the provisions of this Article shall be applicable to such retail sales, leases, rentals, rendering of services, furnishing of rooms, lodgings or accommodations and other taxable transactions which are made, furnished or rendered by retailers whose place of business is located within the taxing county. The tax imposed shall apply to

the furnishing of rooms, lodging or other accommodations within the county which are rented to transients. However no tax shall be imposed where the tangible personal property sold is delivered to the purchaser at a point outside the taxing county by the retailer or his agent, or by a common carrier. (1971, c. 77, s. 2; 1983 (Reg. Sess., 1984), c. 1097, s. 9.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, added the last sentence of the first paragraph.

§ 105-472. Disposition and distribution of taxes collected.

Local Modification. — Burke: 1983 (Reg. Sess., 1984), c. 1034, s. 127.

Article 41.

Alternative Local Government Sales and Use Taxes.

§ 105-494. Use of additional tax revenue by counties and municipalities.

Sales and use tax revenue received by a county or municipality from one-half percent (½%) sales and use taxes levied under this Article are subject to the restrictions imposed by G.S. 105-487 on revenue received by counties and municipalities from one-half percent (½%) sales and use taxes levied under that Article. (1983, c. 908, s. 1.)

Editor's Note. — The section above is set out to correct an error in the 1983 Cumulative Supplement.

Chapter 105A.

Setoff Debt Collection Act.

Article 1.

In General.

Sec.

105A-2. Definitions.

ARTICLE 1.

In General.

§ 105A-2. Definitions.

As used in this Article:

(1) "Claimant agency" means and includes:

a. The State Education Assistance Authority as enabled by Article 23 of Chapter 116 of the General Statutes;

b. The North Carolina Department of Human Resources when in the exercise of its authority to collect health profession student loans made pursuant to G.S. 131-121;

c. The North Carolina Department of Human Resources when in the performance of its duties under the Medical Assistance Program enabled by Chapter 108, Article 2, Part 5, and any county operating the same Program at the local level, when and only to the extent such a county is in the performance of Medical Assistance Program collection functions;

d. The North Carolina Department of Human Resources when in the performance of its duties under the Child Support Enforcement Program (as enabled by Chapter 110, Article 9) to obtain indemnification for the State for past public assistance paid and any county operating the same Program at the local level, when and only to the extent such a county is engaged in the performance of those same program duties;

e. The University of North Carolina, including its constituent institutions as specified by G.S. 116-2(4);

f. The North Carolina Memorial Hospital in the conduct of its financial affairs and operations pursuant to G.S. 116-37;

g. The Board of Governors of the University of North Carolina and the State Board of Education through the College Scholarship Loan Committee when in the performance of its duties of administering the Scholarship Loan Fund for Prospective College Teachers enabled by Chapter 116, Article 5;

h. The Office of the North Carolina Attorney General on behalf of any State agency when the claim has been reduced to a judgment;

i. The State Board of Education through community colleges, technical institutes, and industrial education centers as enabled by Chapter 115D in the conduct of their financial affairs and operations;

j. Broughton Hospital, Cherry Hospital, Dorothea Dix Hospital, John Umstead Hospital, Caswell School at Kinston, Murdoch School, O'Berry School, Western Carolina Center, Black Mountain Alcoholic Rehabilitation Center, Butner Alcoholic Rehabilitation Center, Walter B. Jones Alcoholic Rehabilitation Center, School

for the Deaf at Morganton, North Carolina Sanatorium at McCain, Western Carolina Sanatorium at Black Mountain, Eastern North Carolina Sanatorium at Wilson, and Gravely Sanatorium at Chapel Hill under Chapter 143, Article 7; Governor Morehead School under Chapter 115, Article 40; Central North Carolina School for the Deaf under Chapter 115, Article 41; Wright School for Treatment and Education of Emotionally Disturbed Children under Chapter 122, Article 12A; the Lenox Baker Children's Hospital under Chapter 131, Article 14; and these same institutions by any other names by which they may be known in the future;

k. The North Carolina Department of Revenue;

l. The Administrative Office of the Courts;

m. The Division of Forest Resources of the Department of Natural Resources and Community Development;

n. The Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan, established in Article 3 of General Statutes Chapter 135;

o. The State Board of Education through the Superintendent of Public Instruction when in the performance of his duties of administering the Scholarship Loan Fund for Prospective Teachers enabled by Chapter 115C, Article 32A.

(1979, c. 801, s. 94; 1981, c. 724; 1983, c. 922, s. 21.11; 1983 (Reg. Sess., 1984, c. 1034, s. 10.2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added paragraph (1)o.

OPINIONS OF ATTORNEY GENERAL

The Attorney General's Office cannot act on behalf of counties under the Setoff Debt Collection Act. See opinion of Attorney General to Mr. Lew Gary Darden, Fraud Investigator, Sampson County Department of Social Services, 52 N.C.A.G. 10 (1982).

Chapter 106.

Agriculture.

Article 1.

Department of Agriculture.

Part 2. Commissioner of Agriculture.

Sec.

106-11. (Effective July 1, 1985) Salary of Commissioner of Agriculture.

Article 28B.

Regulation of Production, Distribution, etc., of Milk and Cream.

Sec.

106-266.11. Annual budget of Commission; collection of monthly assessments.

Article 1.

Department of Agriculture.

Part 2. Commissioner of Agriculture.

§ 106-11. (Effective July 1, 1985) Salary of Commissioner of Agriculture.

The salary of the Commissioner of Agriculture shall be set by the General Assembly in the Current Operations Appropriations Act. (1901, c. 479, s. 4; 1905, c. 529; Rev., s. 2749; 1907, c. 887, s. 1; 1913, c. 58; C. S., s. 3872; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 338; 1943, c. 499, s. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 4; 1967, c. 1130; c. 1237, s. 4; 1969, c. 1214, s. 4; 1971, c. 912, s. 4; 1973, c. 778, s. 4; 1975, 2nd Sess., c. 983, s. 19; 1977, c. 802, s. 42.10; 1983, c. 761, s. 208; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 28B.

Regulation of Production, Distribution, etc., of Milk and Cream.

§ 106-266.11. Annual budget of Commission; collection of monthly assessments.

The Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the distributors in the form of monthly assessments. The assessment so levied shall be fixed at a rate per hundredweight on the volume of all milk handled. The rate set shall not exceed one-half of one percent (½%) of the Statewide blend price paid to all North Carolina producers during the previous calendar year for three and one-half percent (3.5%) milk as computed by the North Carolina Milk Commission. One half of any such assessment shall be deducted from funds owed to a producer or any association of producers. (1953, c. 1338, s. 6; 1971, c. 779, s. 1; 1983 (Reg. Sess., 1984), c. 1062, s. 4.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted the present second and third sentences for a former second sentence, which read "The assessments so levied shall not exceed four cents (4¢) per 100 pounds of milk handled."

Article 50.

Promotion of Use and Sale of Agricultural Products.

§ 106-550. Policy as to promotion of use of, and markets for, farm products; tobacco excluded.

CASE NOTES

Applied in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Article 52.

Agricultural Development.

§ 106-583. Policy of State; cooperation of departments and agencies with Agricultural Extension Service.

CASE NOTES

Applied in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Article 57.

Nuisance Liability of Agricultural Operations.

§ 106-700. Legislative determination and declaration of policy.

CASE NOTES

Applied in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Chapter 108A.

Social Services.

Article 2.

Programs of Public Assistance.

Part 2. Aid to Families with Dependent Children.

§ 108A-36. Assistance not assignable; checks payable to decedents.

CASE NOTES

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

Part 6. Medical Assistance Program.

§ 108A-54. Authorization of Medical Assistance Program.

CASE NOTES

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Applied in Bowens v. N.C. Dep't of Human Resources, 710 F.2d 1015 (4th Cir. 1983).

§ 108A-55. Payments.

CASE NOTES

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 108A-57. Subrogation rights; withholding of information a misdemeanor.

CASE NOTES

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 108A-59. Acceptance of medical assistance constitutes assignment to the State of right to third party benefits; recovery procedure.

CASE NOTES

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

§ 108A-61. Financial responsibility of spouse for long-term care patient.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 62(f), provides:

"Spouse Responsibility. Notwithstanding the provisions of G.S. 108A-61, the Department of Human Resources, Division of Medical Assistance, shall not consider the income or assets of the spouse of a person who is admitted as a long-term care patient in a certified public or private intermediate care or skilled nursing facility to be available to the institutionalized person."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 108A-63. Medical assistance provider fraud.

CASE NOTES

Pharmacist who actually furnished and provided medical assistance to Medicaid patients is a "provider" under the statute, unless some other provision of law gives the word a different meaning from the one commonly understood. None does. State v. Beatty, 64 N.C. App. 511, 308 S.E.2d 65 (1983).

Definition of "Provider" in Federal Medicaid Regulations. — Under Title XIX of the Social Security Act 42 U.S.C. § 1396, et seq., drugs prescribed for and dispensed to eligible patients are part of the medical care and services covered by Medicaid and regulations governing all aspects of Medicaid were adopted. These regulations may be found in the Code of Federal Regulations. One of them defines a Medicaid "provider" as "any individual or entity furnishing Medicaid services under a provider agreement with the [state] Medicaid agency." 42 C.F.R. § 430.1 (1982). Another refers to a "provider" as "an individual or entity which furnishes items or services for which payment is claimed under Medicaid." 42 C.F.R. § 455.300(a) (1982). These regulations are as much a part of the law as they would be if they had been read three times and adopted by the General Assembly and explicitly set forth in the General Statutes. State v. Beatty, 64 N.C. App. 511, 308 S.E.2d 65, cert. denied, 309 N.C. 823, 310 S.E.2d 354 (1983).

ARTICLE 6.

Protection of the Abused, Neglected or Exploited Disabled Adult Act.

§ 108A-101. Definitions.

CASE NOTES

Whether "spankings or beatings" of a "disabled adult" amount to abuse within the meaning of subsection (a) of this section depends on the circumstances under which such spankings or beatings are administered. In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

§ 108A-105. Provision of protective services to disabled adults who lack the capacity to consent; hearing, findings, etc.

CASE NOTES

Applied in In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

Chapter 109.

Bonds

Article 5.

Actions on Bonds.

§ 109-34. Liability and right of action on official bonds.

CASE NOTES

Stated in Bynum v. Kidd, 570 F. Supp. 696 (W.D.N.C. 1983).

Chapter 110.

Child Welfare.

Article 7.

Day-Care Facilities.

Sec.
110-86. Definitions.

Article 9.

Child Support.

110-136. Garnishment for enforcement of child-support obligation.
Sec.
110-136.1. Assignment of wages for child support.
110-141. (Effective July 1, 1985) Effectuation of intent of Article.

Article 4A.

Interstate Compact on the Placement of Children.

§ 110-57.1. Adoption of Compact.

OPINIONS OF ATTORNEY GENERAL

Applicability When Child Is Sent Out of State. — The Interstate Compact on the Placement of Children (§ 110-57.1, et seq.) does apply when a North Carolina child is sent by a court, government agency, or child-placing agency to live with a parent, relative, or guardian in another party state. See opinion of Attorney General Dr. Sarah T. Morrow, Secretary, North Carolina Department of Human Resources, 52 N.C.A.G. 22 (1982).

Article 7.

Day-Care Facilities.

§ 110-86. Definitions.

Unless the context or subject matter otherwise requires, the terms or phrases used in this Article shall be defined as follows:

(4) "Day-care plan" includes any day-care program or child-care arrangement in which any person provides day care for more than one child and less than six children at any one time, wherever operated, and whether or not operated for profit. To determine whether a child-care arrangement is a day-care plan, all children shall be counted except the school-age children of the plan operator or provider. The person who is registered shall be the individual who is actually providing care on site for the children.

Notwithstanding the limitation to less than six children prescribed in the first paragraph of this subdivision, a day-care plan operator or provider may provide after-school care for up to three additional children, who are school age, for not more than four after-school hours in any one 24-hour period.

(1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 4, ss. 1-3; 1983, c. 46, s. 1; c. 297, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 78.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the second paragraph of subdivision (4).

Article 9.

Child Support.

§ 110-128. Purposes.

CASE NOTES

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

§ 110-129. Definitions.

CASE NOTES

Cited in Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

§ 110-130. Action by the designated representatives of the county commissioners.

CASE NOTES

County has the authority and the duty to pursue an action against the responsible parent for the maintenance of the child and recovery of amounts paid by the county for support of the child. The county may bring the action in the name of the mother or in its own name. She is in either case required to cooperate with the county in the trial of the action. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

County is the real party in interest in an action to recover amounts paid by the county for support of a child. The child's mother is not the real party in interest. By accepting public assistance, she assigned her right to child support to the county. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

§ 110-131. Compelling disclosure of information respecting the nonsupporting responsible parent of a child receiving public assistance.

CASE NOTES

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

§ 110-132. Acknowledgment of paternity and agreement to support.

CASE NOTES

Legislative Intent. — Judgments of paternity clearly impact heavily on the property interests, liberty interests, and family relationships of the purported father. If the General Assembly intends that such judgments, once entered, are unalterable, regardless of the circumstances, it should expressly so state. The courts are unwilling, by judicial fiat in the process of statutory interpretation, to impose a rule so inflexible and with such potential for manifestly unjust results. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

The apparent legislative purpose in enactment of the "shall be res judicata . . . and shall not be reconsidered" provision in the portion of the statute relating solely to support proceedings (subsection (b)) was to avert costly consumption of the finite time resources of the trial courts by relitigation, in proceedings relating solely to support, of the underlying paternity issue. The absence of such a provision from the portion of the statute relating to the paternity issue (subsection (a)) itself together with the manifest potential for substantial injustice which would result from inability, regardless of the circumstances, to obtain relief from an acknowledgment of paternity, indicates that the General Assembly did not intend to render court approved acknowledgments of paternity a unique category of judgments, peculiarly immune from the grand reservoir of equitable power to do justice in a particular case provided by 1A-1, Rule 60(b)(6). If such were the case, relief would not be possible, for example, even from an acknowledgment entered under extreme duress, such as a threat of death issued with the apparent means and intent to effectuate it. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

The purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. The support issue thus may be before the court on numerous occasions during a child's minority. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

Standing of County, etc. —

A trial court had no authority to dismiss a county's action to show cause for nonpayment of child support, where the putative father had earlier acknowledged paternity under oath and had entered into a voluntary support agreement. Holt v. Shoffner, 63 N.C. App. 381, 304 S.E.2d 787 (1983).

§ 110-133. Agreements of support.

CASE NOTES

The purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. The support issue thus may be before the court on numerous occasions during a child's minority. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

§ 110-135. Debt to State created.

CASE NOTES

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

Cited in Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

§ 110-136. Garnishment for enforcement of child-support obligation.

(c) Following the hearing held pursuant to this section, the court may enter an order of garnishment not to exceed forty percent (40%) of the responsible parent's monthly disposable earnings. If an order of garnishment is entered, a copy of same shall be served on the responsible parent and the garnishee either personally or by certified or registered mail, return receipt requested. The order shall set forth sufficient findings of fact to support the action by the court and the amount to be garnished for each pay period. The amount garnished shall be increased by an additional one dollar ($1.00) processing fee to be assessed and retained by the employer for each payment under the order. The order shall be subject to review for modification and dissolution upon the filing of a motion in the cause.

(1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 11, 12; 1979, c. 386, ss. 1-8; 1983 (Reg. Sess., 1984), c. 1047, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1047, s. 3, makes the act effective 30 days after ratification. The act was ratified July 2, 1984.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment added the next-to-last sentence of subsection (c).

CASE NOTES

Petition Need Not Be Served on Responsible Parent's Employer in Advance of Hearing. — This section does require a copy of the petition for garnishment to be served on the responsible parent's employer in advance of the hearing thereon, such notice is for the benefit of the employer, rather than the debtor, and can be waived by the party entitled to it. Champion v. Champion, 64 N.C. App. 606, 307 S.E.2d 827 (1983).

Cited in Stevens v. Stevens, — N.C. App. —, 314 S.E.2d 786 (1984).

§ 110-136.1. Assignment of wages for child support.

Pursuant to G.S. 50-13.4(f) (1), the court may require the responsible parent to execute an assignment of wages, salary, or other income due or to become due whenever his employer's voluntary written acceptance of the wage assignment under G.S. 95-31 is filed with the court. Such acceptance remains effective until the employer files an express written revocation with the court. The amount assigned shall be increased by an additional one dollar ($1.00) processing fee to be assessed and retained by the employer for each payment under the order. (1981, c. 275, s. 7; 1983 (Reg. Sess., 1984), c. 1047, s. 2.)

Editor's Note. —
Session Laws 1983 (Reg. Sess., 1984), c. 1047, s. 3, makes the act effective 30 days after ratification. The act was ratified July 2, 1984.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment added the last sentence.

§ 110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county.

CASE NOTES

Cited in Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

§ 110-138. Duty of county to obtain support.

CASE NOTES

County has the authority and the duty to pursue an action against the responsible parent for the maintenance of the child and recovery of amounts paid by the county for support of the child. The county may bring the action in the name of the mother or in its own name. She is in either case required to cooperate with the county in the trial of the action. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

County is the real party in interest in an action to recover amounts paid by the county for support of a child. The child's mother is not the real party in interest. By accepting public assistance, she assigned her right to child support to the county. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

§ 110-141. (Effective July 1, 1985) Effectuation of intent of Article.

The North Carolina Department of Human Resources shall supervise the administration of this program in accordance with federal law and shall cause the provisions of this Article to be effectuated and to secure child support from absent, deserting, abandoning and nonsupporting parents.

It is the responsibility of the board of county commissioners to administer, or provide for the administration of, this program in the county. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 16; 1979, c. 488; 1983 (Reg. Sess., 1984), c. 1034, s. 76.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, rewrote the second paragraph, which formerly read "In the event that a board of county commissioners does not desire to continue to administer the program it may only so notify the Department of Human Resources between July 1 and Sept. 1 of the current fiscal year. The obligation of the Department to assume responsibility for the administration of the program in that county shall not commence prior to July 1 of the subsequent fiscal year. Until that time, it shall be the responsibility of the board of county commissioners to administer or provide for the administration of the program in the county."

Chapter 113.

Conservation and Development.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1C.

Commission on International Cooperation.

Sec.

113-28.17 to 113-28.20. [Reserved.]

Article 1D.

Community Action Partnership Act.

113-28.21. Short title.
113-28.22. Purpose.
113-28.23. Designation of administering agency powers and responsibilities.
113-28.24. Designation of eligible agencies.
113-28.25. Activities of Community Action Agency.
Sec.
113-28.26. Organization and authority.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

Article 13.

Jurisdiction of Conservation Agencies.

113-137. Search on arrest; seizure and confiscation of property; disposition of confiscated property.

Article 23C.

North Carolina Seafood Industrial Park Authority.

113-315.26. (Effective July 1, 1985) Personnel.

SUBCHAPTER I. GENERAL PROVISIONS

Article 1C.

Commission on International Cooperation.

§§ 113-28.17 to 113-28.20: Reserved for future codification purposes.

Article 1D.

Community Action Partnership Act.

§ 113-28.21. Short title.

This Article may be cited as the Community Action Partnership Act. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this Article effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 113-28.22. Purpose.

It is the purpose of this Article to provide financial assistance to Community Action Agencies and Limited Purpose Agencies (hereinafter referred to as "agency" or "agencies") to enable those agencies to effectively mobilize public and private resources in order to promote economic self-sufficiency among the poor of the State and to expand those services to all political subdivisions of the State. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1.)

§ 113-28.23. Designation of administering agency powers and responsibilities.

The Department of Natural Resources and Community Development (hereinafter "Department") is directed to carry out the purposes and provisions of this Article. In carrying out this directive, the Secretary of the Department (hereinafter "Secretary") shall promulgate rules consistent with the purposes and provisions of this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1.)

§ 113-28.24. Designation of eligible agencies.

The Secretary shall designate agencies to fulfill the requirements of this Article in the service areas governed by one or more units of local government. An agency so designated may be one of the following:

(1) Agencies which have been officially designated as community action agencies or limited purpose agencies pursuant to Section 210 of the Economic Opportunity Act of 1964, Public Law 88-452, 78 Stat. 508 and which have not lost their designation as a result of a failure to comply with the provisions of that act.

(2) Private nonprofit agencies designated by the chief elected official of a political subdivision or one or more political subdivisions, in areas not served by agencies as defined in subdivision (1) of this section on July 1, 1984. Agencies eligible under this subdivision must apply to the Secretary for designation 60 days in advance of the beginning date of their fiscal year. Political subdivisions designated under this section are authorized to join existing community action agencies contiguous with their boundaries or to organize their own community action agency in order to provide services pursuant to this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1.)

§ 113-28.25. Activities of Community Action Agency.

Agencies shall serve as the local catalyst for the reduction of the causes, conditions, and effects of poverty and shall provide social and economic opportunities that foster self-sufficiency for low-income persons. As such, agencies designated pursuant to G.S. 113-28.24(1) shall be sponsors of the Community Services Block Grant and any successor program thereto. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1.)

§ 113-28.26. Organization and authority.

(a) Agencies, as provided in G.S. 113-28.24 shall have or be required to establish a governing board of directors which shall consist of not less than 15 nor more than 51 members. One-third of the members shall be low-income, elderly, or handicapped consumers residing in the service area of the agency. Consumer representatives shall be selected through a democratic process pursuant to guidelines established by the Department. Not less than one-third of the members of the board shall be appointed by the chief elected officials in the service area. The remaining positions on the board, if any, shall be filled by officials or members of business, industry, labor, religious, welfare, education, or civic organizations located in the service area.

(b) The board of directors shall be responsible for all of the following:

(1) The appointment and dismissal of an executive director.

(2) The approval of contracts, budgets, requests, and major modifications of budgets and contracts.

(3) The performance of an annual audit by certified public accountants to include all assets, liabilities, revenue, and expenditures.
(4) The establishment of policies for the operation of the agency.
(5) Annually advising the chief elected officials of the units of local government within the service area of the nature and extent of poverty within the area. Included in this annual report will be an assessment of the community action agency policies and programs and their impact on the problems of poverty in the service area.
(6) The convening of public meetings to provide low-income and other persons the opportunity to comment upon public policies and programs to reduce poverty. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1.)

SUBCHAPTER II. STATE FORESTS AND PARKS.

ARTICLE 2.

Acquisition and Control of State Forests and Parks.

§ 113-29.1. Growing of timber on unused State lands authorized.

Local Modification. — Granville County: 1983 (Reg. Sess., 1984), c. 1027.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

ARTICLE 13.

Jurisdiction of Conservation Agencies.

§ 113-137. Search on arrest; seizure and confiscation of property; disposition of confiscated property.

(b) Every inspector or protector who issues a citation instead of arresting a person, in cases in which the inspector or protector is authorized to arrest, may seize all lawfully discovered evidence, fruits, and instrumentalities of any crime as to which he has arrest jurisdiction and probable cause. When live fish are returned to public fishing bottoms or public waters, the inspector or protector shall state on the citation the quantity returned.

(e) Except as otherwise specifically provided in this section, all property seized must be safeguarded pending trial by the inspector or protector initiating the prosecution. Upon a conviction the property seized in connection with the offense in question is subject to the disposition ordered by the court. Upon an acquittal, property seized must be returned to the defendant or established owner, except:

(1) Where the property was summarily disposed of in accordance with subsection (d);
(2) Where possession of the property by the person to whom it otherwise would be returned would constitute a crime; and
(3) Where the property seized has been sold in accordance with subsection (g). In this event the net proceeds of the sale must be returned to the defendant or established owner, as the case may be.

Where property seized summarily under subsection (d) is not available for return, an acquitted defendant or established owner is entitled to no compensation where there was probable cause for the action taken. Within 20 days of the final court adjudication of a citation, the Department or the Wildlife Resources Commission shall notify any acquitted defendant or established owner of its duly established procedures whereby reimbursement may be sought for live fish seized summarily under subsection (d) that is not available for return. Any action or proceeding to recover compensation must be begun within 30 days after receipt of the notice of applicable procedures. After the expiration of this period of limitation, no right or action or claim for compensation shall be asserted.

In safeguarding property seized pending trial, an inspector or protector is authorized in his discretion, subject to orders of his administrative superiors, to make his own provisions for storage or safekeeping or to deposit the property with the sheriff of the county in which the trial is to be held for custody pending trial. In the event the mode of safekeeping reasonably selected by the inspector or protector entails a storage or handling charge, such charge is to be paid as follows:

(1) By the defendant if he is convicted but the court nevertheless orders the return of the property to the defendant;

(2) From the proceeds of the sale of the property if the property is sold under court order or in accordance with the provisions of this section; or

(3) By the Department or by the Wildlife Resources Commission, as the case may be, if no other provision for payment exists.

(g) Where a prosecution involving seized saleable fish is pending and such fish are perishable or seasonal, the inspector or protector may apply to the court in which the trial is pending for an order permitting sale prior to trial. As used in this subsection, seasonal fish are those which command a higher price at one season than at another so that economic loss may occur if there is a delay in the time of sale. When ordered by the court, such sale prior to trial must be conducted in accordance with the order of the court or in accordance with the provisions of this section. The net proceeds of such sale are to be deposited with the court and are subject to the same disposition as would have been applicable to other types of property seized. Where sale is not lawful for public health reasons or otherwise not practicable or where prosecution is not pending, disposal of the fish is in accordance with subsection (d).

(1915, c. 84, s. 6; 1917, c. 290, s. 2; C.S., s. 1885; 1935, c. 118; 1953, c. 1134; 1957, c. 1423, s. 2; 1961, c. 1189, s. 4; 1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28; 1979, c. 830, s. 1; 1983 (Reg. Sess., 1984), c. 1083, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, added the second sentence of subsection (b), added the last three sentences of subsection (e), and inserted "for public health reasons" in the last sentence of subsection (g).

Article 23C.

North Carolina Seafood Industrial Park Authority.

§ 113-315.26. (Effective July 1, 1985) Personnel.

The Secretary of Commerce shall appoint such management personnel as deemed necessary who shall serve at the pleasure of the Secretary of Commerce. The salaries of these personnel shall be fixed by the General Assembly in the Current Operations Appropriations Act. The Secretary of Commerce shall have the power to appoint, employ and dismiss such number of employees as he may deem necessary to accomplish the purposes of this Article subject to the availability of funds. The power to appoint, employ and dismiss personnel, and to fix the number thereof, may be delegated to one or more of the management personnel upon such terms and subject to such restrictions and limitations as the Secretary of Commerce may deem proper. The compensation of such employees shall be fixed by the Secretary of Commerce. It is recommended that, to the fullest extent possible, the Secretary of Commerce consult with the Authority on matters of personnel. (1979, c. 459, s. 2; 1983, c. 717, s. 24; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Chapter 113A.

Pollution Control and Environment.

Article 4.

Sedimentation Pollution Control Act of 1973.

Sec.

113A-54. Powers and duties of the Commission.

113A-57. Mandatory standards for land-disturbing activity.

Article 8.

North Carolina Land Conservancy Corporation.

113A-135 to 113A-149. [Repealed.]

Article 1.

Environmental Policy Act.

§ 113A-1. Title.

Cross References. — For provision exempting the issuance of permits for sanitary landfills operated by local governments from the environmental impact statements required by this Article, see § 130A-294(a)(4).

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

Article 4.

Sedimentation Pollution Control Act of 1973.

§ 113A-50. Short title.

CASE NOTES

Cited in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

§ 113A-54. Powers and duties of the Commission.

(b) The Commission shall develop and adopt and shall revise as necessary from time to time, rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities. The Commission shall adopt or revise its rules and regulations in accordance with the rulemaking procedures set forth in Article 2 of Chapter 150A of the General Statutes.

(d) In implementing the erosion and sedimentation control program, the Commission is authorized and directed to:

(1) Assist and encourage local governments in developing erosion and sediment control programs and as part of such assistance to develop a model local erosion control ordinance, and approve, approve as modified, or disapprove local plans submitted to it pursuant to G.S. 113A-60;

(2) Assist and encourage other State agencies in developing erosion and sedimentation control programs to be administered in their jurisdictions, and to approve, approve as modified, or disapprove such programs submitted pursuant to G.S. 113A-56 and from time to time

review such programs for compliance with regulations issued by the Commission and for adequate enforcement;

(3) Develop recommended methods of control of sedimentation and prepare and make available for distribution publications and other materials dealing with sedimentation control techniques appropriate for use by persons engaged in land-disturbing activities, general educational materials on erosion and sedimentation control, and instructional materials for persons involved in the enforcement of erosion control regulations, ordinances, and plans;

(4) Require submission of erosion control plans by those responsible for initiating land-disturbing activities for approval prior to commencement of the activities. As to those activities requiring prior plan approval, the Commission must either approve or disapprove the plan within 30 days of receipt. Failure to approve or disapprove a complete erosion and sedimentation control plan within 30 days of receipt shall be deemed approval. Denial of a plan must specifically state in writing the reasons for denial. The Commission must approve or deny a revised plan within 15 days of receipt, or it is deemed to be approved.

If, following commencement of a land-disturbing activity pursuant to an approved plan, the Commission determines that the plan is inadequate to meet the requirements of this Article, the Commission may require such revisions as are necessary to comply with this act. The Commission must approve or deny the revised plan within 15 days of receipt, or it is deemed to be approved.

(f) All rules and regulations of the Commission promulgated pursuant to this Article shall be incorporated either in the Secretary's official regulations or his rules of procedure. All such rules and regulations shall upon adoption be filed with the Attorney General as required by Chapter 150A of the General Statutes, and copies thereof shall be filed with the several clerks of court of the counties of the State. Copies shall at all times be kept at the office of the Secretary in sufficient numbers to satisfy all reasonable requests therefor. (1973, c. 392, s. 5; c. 1331, s. 3; c. 1417, s. 6; 1975, 2nd Sess., c. 983, s. 74; 1977, c. 464, s. 35; 1979, c. 922, s. 2; 1983 (Reg. Sess., 1984), c. 1014, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (b) of this section is set out above at the direction of the Revisor of Statutes to correct an erroneous version of (b) in the Replacement Volume.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, deleted "and to require at its discretion, submission of erosion control plans by those responsible for initiating land-disturbing activities for approval prior to commencement of said activities" at the end of subdivision (d)(2), substituted a semicolon for a period at the end of subdivision (d)(3), added subdivision (d)(4), and deleted a former last sentence of subsection (f), which read "Except for those activities enumerated in G.S. 113A-56 over which the Commission has exclusive jurisdiction, the Commission shall in no event require approval prior to the commencement of land-disturbing activity."

CASE NOTES

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

§ 113A-57. Mandatory standards for land-disturbing activity.

No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements:

(4) No person shall initiate any land-disturbing activity if more than one contiguous acre is to be uncovered unless, 30 or more days prior to initiating the activity, an erosion and sedimentation control plan for such activity is filed with the agency having jurisdiction. (1973, c. 392, s. 8; c. 1417, s. 5; 1975, c. 847, s. 2; 1979, c. 564; 1983 (Reg. Sess., 1984), c. 1014, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 28, 1984, added subdivision (4).

§ 113A-64. Penalties.

CASE NOTES

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

§ 113A-66. Civil relief.

CASE NOTES

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

ARTICLE 8.

North Carolina Land Conservancy Corporation.

§§ 113A-135 to 113A-149: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 4, effective June 27, 1984.

Chapter 113B.

North Carolina Energy Policy Act of 1975.

Article 2.

Energy Crisis Administration.

Sec.
113B-21. Creation of Legislative Committee on Energy Crisis Management.
Sec.
113B-22. Procedures for adopting emergency proposals; emergency powers.
113B-23. Administration of plans and procedures.

Article 2.

Energy Crisis Administration.

§ 113B-21. Creation of Legislative Committee on Energy Crisis Management.

(a) There is hereby created a Legislative Committee on Energy Crisis Management to consist of the Speaker, as chairman, the Speaker pro tempore of the House of Representatives and the President pro tempore and the majority leader of the Senate. The Lieutenant Governor shall serve as a nonvoting ex officio member, provided, however, that he shall vote to break a tie.

(1975, c. 877, s. 4; 1977, c. 23, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 135.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "assistant" preceding "majority leader" near the end of the first sentence of subsection (a).

§ 113B-22. Procedures for adopting emergency proposals; emergency powers.

(b) The Governor shall immediately consult with the Legislative Committee about the emergency proposals. The emergency orders, rules, or regulations shall become effective at a time specified by the Governor, but no earlier than 48 hours after submission to the Legislative Committee, provided that they may take effect at an earlier time if approved by a majority vote of the Council of State after the Council makes a finding that the crisis is of such immediacy as to make delay for legislative review cause for probable harm to the public.

(c) No order, rule, or regulation promulgated under the provisions of this section shall remain in effect for more than 30 days unless the Governor consults with the Legislative Committee. Such consultation is separate and apart from the consultation required by subsection (a) of this section, and may not take place until the order, rule, or regulation has been in effect for at least seven days.

(d) The Governor's orders, rules and regulations, promulgated, subject to consultation with the Legislative Committee, pursuant to this section, may also include, by way of further enumerated example rather than limitation, provisions for the establishment and implementation of programs, controls, standards, priorities, and quotas for the allocation, conservation and consumption of energy resources; the suspension and modification of existing standards and requirements affecting or affected by the use of energy

resources, including those relating to air quality control and the hours and days during which public buildings may or may not be required to remain open; and the establishment and implementation of regional programs and agreements for the purposes of coordinating the energy resource programs and actions of the State with those of the federal government and of other states and localities. (1975, c. 877, s. 4; 1983 (Reg. Sess., 1984), c. 1034, ss. 136, 137.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote subsections (b) and (c) and substituted "consultation with the Legislative Committee" for "the review of the Legislative Committee" near the beginning of subsection (d).

§ 113B-23. Administration of plans and procedures.

(b) Upon the declaration of an energy crisis, the Governor shall order the Energy Policy Council, the Utilities Commission, the Attorney General and other appropriate State and local agencies to implement and enforce the Emergency Energy Program pursuant to G.S. 113B-9 and any emergency rules, orders or regulations approved pursuant to G.S. 113B-22.

(1975, c. 877, s. 4; 1983 (Reg. Sess., 1984), c. 1034, s. 138.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "and upon the approval of the Legislative Committee" following "Upon the declaration of an energy crisis" near the beginning of subsection (b).

Chapter 114.

Department of Justice.

Article 1.

Attorney General.

Sec.
114-2.1. Consent judgments.
Sec.
114-2.2. Attorney General to approve consent judgments.
114-7. (Effective July 1, 1985) Salary of the Attorney General.

Article 1.

Attorney General.

§ 114-1. Creation of Department of Justice under supervision of Attorney General.

CASE NOTES

Legislative Intent. — The constitutional independence of the executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

§ 114-2. Duties.

CASE NOTES

Legislative Intent. — The constitutional independence of the executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of subdivision (2) of this section, did not intend to create such potential. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

The Attorney General is bound by the traditional rule governing the attorney-client relationship when representing the departments, agencies, institutions, commissions, bureaus or other organized activities of the State. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

And cannot enter a consent judgment without the consent of a duly authorized department official. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

An agency or department of the State should have the right possessed by other litigants to determine whether its counsel, whether the Attorney General or otherwise, can enter a consent judgment on its behalf. Such a right is also consonant with fulfillment by the respective agencies and departments of the State of their statutorily assigned duties. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

There is nothing in the common-law powers of the Attorney General which grants him authority to enter consent judgments binding the agencies and departments of the State without their consent. North Carolina statutes do not expressly grant such power. The assignment of specific responsibilities and duties to the various agencies and departments

would appear to indicate legislative intent to the contrary. Given the constitutional and statutory structure of state government, and the assignment of duties and responsibilities between and among its officers, agencies, and departments, considerations of sound public policy also suggest the contrary rule. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

Applied in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

§ 114-2.1. Consent judgments.

In litigation in which the State is interested or is a party, no consent judgment shall be entered into by the State unless and no consent judgment shall be binding on the State except to the extent that the State's entire obligation for the current and for future fiscal years will be satisfied with funds that are available for that purpose for the current fiscal year, including funds that the Council of State agrees to allot from the Contingency and Emergency Fund, provided that for payments of tort claims and workers' compensation claims it shall not be binding on the State except to the extent that the State's entire obligation for the current and for future fiscal years can be satisfied with funds that are available for the current fiscal year, including funds that the Council of State agrees to allot from the Contingency and Emergency Fund. The Director of the Budget shall report to the appropriation committees of the General Assembly concerning all funds made available during the preceding fiscal year from the Contingency and Emergency Fund for the purpose of carrying out consent judgments. (1981 (Reg. Sess., 1982), c. 1282, s. 51; 1983 (Reg. Sess., 1984), c. 1034, s. 95; c. 1116, s. 85.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 95, effective September 1, 1984, substituted "will be satisfied" for "can be satisfied" and "available for that purpose for the current fiscal year" for "available for the current fiscal year" in the first sentence and added the proviso at the end of that sentence.

The 1983 (Reg. Sess., 1984) amendment by c. 116, s. 85, effective July 1, 1984, substituted "tort claims and workers' compensation claims" for "tort claims" in the proviso added by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 95.

CASE NOTES

An attorney cannot enter a consent judgment without the consent of his client. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

The Attorney General is bound by the traditional rule governing the attorney-client relationship, and cannot enter a consent judgment without the consent of the entity represented. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

There is nothing in the common-law powers of the Attorney General which grants him authority to enter consent judgments binding the agencies and departments of the State without their consent. North Carolina statutes do not expressly grant such power. The assignment of specific responsibilities and duties to the various agencies and departments would appear to indicate legislative intent to the contrary. Given the constitutional and statutory structure of state government, and the assignment of duties and responsibilities between and among its officers, agencies, and departments, considerations of sound public policy also suggest the contrary rule. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

An agency or department of the State should have the right possessed by other litigants to determine whether its counsel, whether the Attorney General or otherwise, can enter a consent judgment on its behalf. Such a right is also consonant with fulfillment by the respective agencies and departments of the State of their statutorily assigned duties. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

§ 114-2.2. Attorney General to approve consent judgments.

(a) To be effective against the State, a consent judgment entered into by the State, a State department, State agency, State institution, or a State officer who is a party in his official capacity must be signed personally by the Attorney General. This power of approval may not be delegated to a deputy or assistant Attorney General or to any other subordinate.

(b) The provisions of this section are supplemental to G.S. 114-2.1.

(c) Notwithstanding subsection (a) of this section, the Attorney General by rule may delegate to a deputy or assistant Attorney General or to another subordinate the power to sign consent judgments in condemnation or eminent domain actions brought under the provisions of Chapters 40A or 136 of the General Statutes and consent judgments under the provision of Article 31 of Chapter 143 (Tort Claims Act) and Chapter 97 (Workers' Compensation Act) of the General Statutes. (1983 (Reg. Sess., 1984), c. 1034, s. 95; c. 1116, s. 85.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 95(e), makes this section effective September 1, 1984, except that rules issued under subsection (c) of this section may be issued at any time after ratification. The act was ratified June 29, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, by c. 1116, s. 85, effective July 1, 1984, added "and consent judgments under the provision of Article 31 of Chapter 143 (Tort Claims Act) and Chapter 97 (Workers' Compensation Act) of the General Statutes" at the end of subsection (c).

§ 114-7. (Effective July 1, 1985) Salary of the Attorney General.

The salary of the Attorney General shall be set by the General Assembly in the Current Operations Appropriations Act. (1929, c. 1, s. 2; 1947, c. 1043; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 3; 1967, c. 1130; c. 1237, s. 3; 1969, c. 1214, s. 3; 1971, c. 912, s. 3; 1973, c. 778, s. 3; 1975, 2nd Sess., c. 983, s. 18; 1977, c. 802, s. 42.14; 1983, c. 761, s. 209; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Chapter 115C.

Elementary and Secondary Education.

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115C-47. (Effective July 1, 1985) Powers and duties generally.

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Article 32A.

Scholarship Loan Fund for Prospective Teachers.

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SUBCHAPTER X. PRIVATE AND PROPRIETARY SCHOOLS.

Article 40.
Proprietary Schools.

115C-575. [Repealed.]

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Definitions and Preliminary Provisions.

§ 115C-1. General and uniform system of schools.

A general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall be provided for all students, in accordance with the provisions of Article IX of the Constitution of North Carolina. Tuition shall be free of charge to all children of the State, and to every person of the State less then 19 years old who has not completed a standard high school course of study. There shall be operated in every local school administrative unit a uniform school term of nine months, without the levy of a State ad valorem tax therefor. (1955, c. 1372, art. 1, s. 1; 1963, c. 448, s. 24; 1971, c. 704, s. 1; c. 1231, s. 1; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 21.)

Local Modification. —
(As to Chapter 115C) Durham City Board of Education: 1983 (Reg. Sess., 1984), c. 948; Kannapolis City School Administrative Unit: 1983 (Reg. Sess., 1984), c. 963.

Editor's Note. —
Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "every person of the State less than 19 years old" for "every person 18 years of age, or over" in the second sentence.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION OF STATE AND LOCAL EDUCATION AGENCIES.

ARTICLE 2.

State Board of Education.

§ 115C-12. Powers and duties of the Board generally.

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The powers and duties of the State Board of Education are defined as follows:

(18) Duty to Develop and Implement a Centralized Payroll System. — The State Board of Education shall develop and implement a centralized payroll system for the public schools. Beginning with the 1985-86 school year, all State-funded, certified employees of the public schools shall be paid through this system. No later than the 1986-87 school year, all noncertified employees of the public schools shall be paid through this system. All payments shall be made by electronic funds transfer from the General Fund to a financial institution at which the employee has an account. At the end of the first pay period of each calendar year, each employee shall receive a statement of his salary grade and step and his annual salary.

Local boards of education may elect to pay employees paid from non-State funds and to pay local supplements through the centralized payroll system. (1955, c. 1372, art. 2, s. 2; art. 17, s. 6; art. 18, s. 2; 1957, c. 541, s. 11; 1959, c. 1294; 1961, c. 969; 1963, c. 448, ss. 24, 27; c. 688, ss. 1, 2; c. 1223, s. 1; 1965, c. 584, s. 20.1; c. 1185, s. 2; 1967, c. 643, s. 1; 1969, c. 517, s. 1; 1971, c. 704, s. 4; c. 745; 1973, c. 236; c. 476, s. 138; c. 675; 1975, c. 686, s. 1; c. 699, s. 2; c. 975; 1979, c. 300, s. 1; c. 935; c. 986; 1981, c. 423, s. 1; 1983, c. 630, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 16(d), provides: "The State Board of Education shall report to the Joint Legislative Commission on Governmental Operations by December 1, 1984, on its progress in developing the centralized payroll system mandated in subsection (a) of this section. It shall also report any statutory changes it would need to implement the system. The State Board shall make a final implementation report on the system for certified employees by April 1, 1985, to the President of the Senate, the Speaker of the House, the President Pro Tempore of the Senate, the Speaker Pro Tempore of the House, the Majority Leader of the Senate and the Chairmen of the Appropriations Committees of the Senate and the House. The State Board shall make a final implementation report on the System for noncertified employees by April 1, 1986, to the Joint Legislative Commission on Governmental Operations."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 219, provides:

"Notwithstanding the provisions of Section 19.1 of Chapter 1137 of the 1979 Session Laws as amended by Chapter 1053 of the 1981 Session Laws, G.S. 115C-12(9)a., G.S. 126-7, or any other provision of law, no employee or officer of the public school system shall receive an automatic increment, and no State employee or officer shall receive a merit increment during the 1984-85 fiscal year, except as otherwise permitted by this act. This section expires June 30, 1985.

"The General Assembly recognizes that because of budget constraints, automatic increments and annual increments have been frozen since July 1, 1982. If the State is to attract and retain qualified teachers and State employees, it is imperative that automatic increments and annual increments be reinstated as soon as possible. Therefore, the General Assembly

requests that the Governor and the Advisory Budget Commission give the reinstatement of the annual increments and merit increments and the addition of the tenth step in the State employees salary plan the highest priority when they prepare a budget for the 1985-87 fiscal biennium."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added subdivision (18).

Article 3.

Department of Public Instruction.

§ 115C-20. (Effective July 1, 1985) Office and salary.

The Superintendent of Public Instruction shall keep his office in the Education Building in Raleigh, and his salary shall be set by the General Assembly in the Current Operations Appropriations Act. (1955, c. 1372, art. 3, s. 2; c. 1374; 1963, c. 1178, s. 2; 1967, c. 1130; c. 1237, s. 2; 1969, c. 1214, s. 2; 1971, c. 912, s. 2; 1973, c. 778, s. 2; 1975, 2nd Sess., c. 983, s. 17; 1977, c. 802, s. 42.15; 1981, c. 423, s. 1; 1983, c. 761, s. 210; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 5.

Local Boards of Education.

§ 115C-47. (Effective until July 1, 1985) Powers and duties generally.

In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:

(1) To Provide an Adequate School System. — It shall be the duty of local boards of education to provide adequate school systems within their respective local school administrative units, as directed by law.

(2) To Exercise Certain Judicial Functions and to Participate in Certain Suits and Actions. — Local boards of education shall have the power and authority to exercise certain judicial functions pursuant to the provisions of G.S. 115C-45 and to participate in certain suits and actions pursuant to the provisions of G.S. 115C-44.

(3) To Divide Local School Administrative Units into Attendance Areas. — Local boards of education shall have authority to divide their various units into attendance areas without regard to district lines.

(4) To Regulate Extracurricular Activities. — Local boards of education shall make all rules and regulations necessary for the conducting of extracurricular activities in the schools under their supervision, including a program of athletics, where desired, without assuming liability therefor; provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education.

§ 115C-47 is set out twice. See section heading for effective dates.

(5) To Fix Time of Opening and Closing Schools. — The time of opening and closing the public schools shall be fixed pursuant to the provisions of G.S. 115C-84(e).

(6) To Regulate Fees, Charges and Solicitations. — Local boards of education shall adopt rules and regulations governing solicitations of, sales to, and fund-raising activities conducted by, the students and faculty members in schools under their jurisdiction, and no fees, charges, or costs shall be collected from students and school personnel without approval of the board of education as recorded in the minutes of said board; provided, this subdivision shall not apply to such textbook fees as are determined and established by the State Board of Education. All schedules of fees, charges and solicitations approved by local boards of education shall be reported to the Superintendent of Public Instruction.

(7) To Accept and Administer Federal or Private Funds. — Local boards of education shall have power and authority to accept, receive and administer any funds or financial assistance given, granted or provided under the provisions of the Elementary and Secondary Education Act of 1965 (Public Law 89-10, 89th Congress, HR 2362) and under the provisions of the Economic Opportunity Act of 1964 (Public Law 88-452, 88th Congress, S. 2642), or other federal acts or funds from foundations or private sources, and to comply with all conditions and requirements necessary for the receipt, acceptance and use of said funds. In the administration of such funds, local boards of education shall have authority to enter into contracts with and to cooperate with and to carry out projects with nonpublic elementary and secondary schools, community groups and nonprofit corporations, and to enter into joint agreements for these purposes with other local boards of education. Local boards of education shall furnish such information as shall be requested by the State Board of Education, from time to time, relating to any programs related or conducted pursuant to this subdivision.

(8) To Sponsor or Conduct Educational Research. — Local boards of education are authorized to sponsor or conduct educational research and special projects approved by the Department of Public Instruction and the State Board of Education that may improve the school system under their jurisdictions. Such research or projects may be conducted during the summer months and the board may use any available funds for such purposes.

(9) To Assure Accurate Attendance Records. — When the governing board of any local school administrative unit shall have information that inaccurate school attendance records are being kept, the board concerned shall immediately investigate such inaccuracies and take necessary action to establish and maintain correct records and report its findings and action to the State Board of Education.

(10) To Assure Appropriate Class Size. — It shall be the responsibility of local boards of education to determine if any exceptions occur during the school year in the allowed maximums. If additional pupils are enrolled so as to cause assignment of pupils in excess of the allowed maximums, except for an emergency or act of God, it shall be the duty of any affected teacher and of the principal to notify the superintendent, who shall immediately report the deviation to the local board of education. Upon notification of excess deviations in the maximum class size, local boards shall take correctional steps and shall transfer teaching positions between schools, if necessary, to correct the excess deviation. If the local board cannot remedy the

§ 115C-47 is set out twice. See section heading for effective dates.

situation, it shall immediately apply to the State Board of Education for contingency funds for additional personnel to correct exceptions. Excess deviations which cannot be corrected by transfer of teachers and by use of contingency funds shall be temporarily allowed with permission of the State Board of Education.

At the end of the first month of school each year, the superintendent of each administrative unit shall file a report for each school with the State Board of Education. This report shall be filed on forms furnished by the board and shall indicate the complete organization of each school, the duties of each teacher or other instructional personnel, and the class size or teaching load of each teacher.

It shall be the duty of local boards of education to provide adequate classroom facilities to meet the requirements of this subdivision and of G.S. 115C-301.

(11) To Determine the Length of the School Day, the School Month and the School Term. — Local boards of education shall determine the length of the school day, the school month and the school term pursuant to the provisions of G.S. 115C-84(a) through (c).

(12) To Provide for Efficient Teaching of Subjects in the Outline Course of Study. — Local boards of education shall provide for the efficient teaching in each grade of all subjects included in the outline course of study prepared by the Superintendent of Public Instruction, as provided in G.S. 115C-81(b).

(13) To Elect a Superintendent. — The local boards of education shall elect superintendents subject to the requirements and limitations set forth in G.S. 115C-271.

(14) To Supply an Office, Equipment and Clerical Assistance for the Superintendent. — It shall be the duty of the various boards of education to provide the superintendent of schools with an office, equipment and clerical assistance as provided in G.S. 115C-277.

(15) To Prescribe Duties of Superintendent. — The local boards of education shall prescribe the duties of the superintendent as subject to the provisions of G.S. 115C-276(a).

(16) To Remove a Superintendent or Committeeman, When Necessary. — Local boards of education shall remove a superintendent or a committeeman for cause, pursuant to the provisions of G.S. 115C-59 and 115C-274(a).

(17) To Employ Assistant Superintendents and Supervisors. — Local boards of education have the authority to employ assistant superintendents and supervisors pursuant to the provisions of G.S. 115C-278 and 115C-284(g).

(18) To Make Rules Concerning the Conduct and Duties of Personnel. — Local boards of education, upon the recommendation of the superintendent, shall have full power to make all just and needful rules and regulations governing the conduct of teachers, principals, and supervisors, the kind of reports they shall make, and their duties in the care of school property.

(19) To Approve the Assignment of Duties to an Assistant Principal. — Local boards of education shall permit certain duties of the principal to be assigned to an assistant or acting principal pursuant to the provisions of G.S. 115C-289.

(20) To Provide for Training of Teachers. — Local boards of education are authorized to provide for the training of teachers as provided in G.S. 115C-300.

(21) To Pay School Employees. — It shall be the duty of every local board of education to provide for the prompt monthly payment of all salaries

§ 115C-47 is set out twice. See section heading for effective dates.

due teachers and other school officials and employees, and of all current bills and other necessary operating expenses. All salaries and bills shall be paid as provided by law for disbursing State and local funds.

The local board shall determine salary schedules of employees pursuant to the provisions of G.S. 115C-273, 115C-285(b), 115C-302(b) and 115C-316(b).

The authority for boards of education to issue salary vouchers to all school employees, whether paid from State or local funds, shall be a monthly payroll prepared on forms furnished by the State Board of Education and containing all information required by the controller of the State Board of Education. This monthly payroll shall be signed by the principal of each school.

(22) To Provide School Food Services. — Local boards of education shall provide, to the extent practicable, school food services as provided in Part 2 of Article 17 of this Chapter.

(23) To Purchase Equipment and Supplies. — They shall contract for equipment and supplies pursuant to the provisions of G.S. 115C-522(a).

(24) Purchase of Activity Buses with Local Capital Outlay Tax Funds. — Local boards of education are authorized to purchase activity buses with local capital outlay tax funds, and are authorized to maintain these buses in the county school bus garage. Reimbursement to the State Public School Fund shall be made for all maintenance cost including labor, gasoline and oil, repair parts, tires and tubes, antifreeze, etc. Labor cost reimbursements and local funds may be used to employ additional mechanics so as to insure that all activity buses owned and operated by local boards of education are maintained in a safe mechanical condition. The State Board of Education shall inspect each activity bus and recommend to the board whether the bus should be replaced but replacements will be determined by the local board of education. Such replacement units for activity buses shall be financed with local funds.

(25) To Secure Liability Insurance. — Local boards of education are authorized to secure liability insurance, as provided in G.S. 115C-42, so as to waive their immunity for liability for certain negligent acts of their employees.

(26) If a local board of education provides access to its buildings and campus and the student information directory to persons or groups which make students aware of occupational or educational options, the local board of education shall provide access on the same basis to official recruiting representatives of the military forces of the State and of the United States for the purpose of informing students of educational and career opportunities available in the military.

(27) To Provide Retirement Age. — The local board of education may by resolution provide that every administrative officer whom it elects and every certificated personnel who serve that local school administrative unit shall retire on July 1 coincident with or next following their seventieth birthday, unless continued in service on a year-to-year basis in accordance with regulations adopted by the local board of education. (1955, c. 1372, art. 5, ss. 18, 28, 30, 33; art. 6, s. 6; art. 17, s. 6; c. 1185; 1959, c. 1294; 1963, c. 425; c. 688, s. 3; 1965, c. 584, ss. 4, 6; c. 1185, s. 1; 1969, c. 517, s. 2; c. 539; 1973, c. 770, ss. 1, 2; c. 782, s. 31; 1975, c. 150, s. 1; c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; c. 901, s. 1; 1983 (Reg. Sess., 1984), c. 1019, s. 2.1.)

§ 115C-47 is set out twice. See section heading for effective dates.

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 115C-47.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, added subdivision (27).

§ 115C-47. (Effective July 1, 1985) Powers and duties generally.

In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:

(1) To Provide an Adequate School System. — It shall be the duty of local boards of education to provide adequate school systems within their respective local school administrative units, as directed by law.

(2) To Exercise Certain Judicial Functions and to Participate in Certain Suits and Actions. — Local boards of education shall have the power and authority to exercise certain judicial functions pursuant to the provisions of G.S. 115C-45 and to participate in certain suits and actions pursuant to the provisions of G.S. 115C-44.

(3) To Divide Local School Administrative Units into Attendance Areas. — Local boards of education shall have authority to divide their various units into attendance areas without regard to district lines.

(4) To Regulate Extracurricular Activities. — Local boards of education shall make all rules and regulations necessary for the conducting of extracurricular activities in the schools under their supervision, including a program of athletics, where desired, without assuming liability therefor; provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education.

(5) To Fix Time of Opening and Closing Schools. — The time of opening and closing the public schools shall be fixed pursuant to the provisions of G.S. 115C-84(e).

(6) To Regulate Fees, Charges and Solicitations. — Local boards of education shall adopt rules and regulations governing solicitations of, sales to, and fund-raising activities conducted by, the students and faculty members in schools under their jurisdiction, and no fees, charges, or costs shall be collected from students and school personnel without approval of the board of education as recorded in the minutes of said board; provided, this subdivision shall not apply to such textbook fees as are determined and established by the State Board of Education. All schedules of fees, charges and solicitations approved by local boards of education shall be reported to the Superintendent of Public Instruction.

(7) To Accept and Administer Federal or Private Funds. — Local boards of education shall have power and authority to accept, receive and administer any funds or financial assistance given, granted or provided under the provisions of the Elementary and Secondary Education Act of 1965 (Public Law 89-10, 89th Congress, HR 2362) and under the provisions of the Economic Opportunity Act of 1964 (Public Law 88-452, 88th Congress, S. 2642), or other federal acts or funds from foundations or private sources, and to comply with all conditions and requirements necessary for the receipt, acceptance and use of said funds. In the administration of such funds, local boards of education shall have authority to enter into contracts with and to cooperate with and to carry out projects with nonpublic elementary and secondary schools, community groups and nonprofit corporations, and to enter into joint agreements for these purposes with other local boards of

§ 115C-47 is set out twice. See section heading for effective dates.

education. Local boards of education shall furnish such information as shall be requested by the State Board of Education, from time to time, relating to any programs related or conducted pursuant to this subdivision.

(8) To Sponsor or Conduct Educational Research. — Local boards of education are authorized to sponsor or conduct educational research and special projects approved by the Department of Public Instruction and the State Board of Education that may improve the school system under their jurisdictions. Such research or projects may be conducted during the summer months and the board may use any available funds for such purposes.

(9) To Assure Accurate Attendance Records. — When the governing board of any local school administrative unit shall have information that inaccurate school attendance records are being kept, the board concerned shall immediately investigate such inaccuracies and take necessary action to establish and maintain correct records and report its findings and action to the State Board of Education.

(10) To Assure Appropriate Class Size. — It shall be the responsibility of local boards of education to determine if any exceptions occur during the school year in the allowed maximums. If additional pupils are enrolled so as to cause assignment of pupils in excess of the allowed maximums, except for an emergency or act of God, it shall be the duty of any affected teacher and of the principal to notify the superintendent, who shall immediately report the deviation to the local board of education. Upon notification of excess deviations in the maximum class size, local boards shall take correctional steps and shall transfer teaching positions between schools, if necessary, to correct the excess deviation. If the local board cannot remedy the situation, it shall immediately apply to the State Board of Education for contingency funds for additional personnel to correct exceptions. Excess deviations which cannot be corrected by transfer of teachers and by use of contingency funds shall be temporarily allowed with permission of the State Board of Education.

At the end of the first month of school each year, the superintendent of each administrative unit shall file a report for each school with the State Board of Education. This report shall be filed on forms furnished by the board and shall indicate the complete organization of each school, the duties of each teacher or other instructional personnel, and the class size or teaching load of each teacher.

It shall be the duty of local boards of education to provide adequate classroom facilities to meet the requirements of this subdivision and of G.S. 115C-301.

(11) To Determine the Length of the School Day, the School Month and the School Term. — Local boards of education shall determine the length of the school day, the school month and the school term pursuant to the provisions of G.S. 115C-84(a) through (c).

(12) To Provide for Efficient Teaching of Subjects in the Outline Course of Study. — Local boards of education shall provide for the efficient teaching in each grade of all subjects included in the outline course of study prepared by the Superintendent of Public Instruction, as provided in G.S. 115C-81(b).

(13) To Elect a Superintendent. — The local boards of education shall elect superintendents subject to the requirements and limitations set forth in G.S. 115C-271.

(14) To Supply an Office, Equipment and Clerical Assistance for the Superintendent. — It shall be the duty of the various boards of educa-

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tion to provide the superintendent of schools with an office, equipment and clerical assistance as provided in G.S. 115C-277.

(15) To Prescribe Duties of Superintendent. — The local boards of education shall prescribe the duties of the superintendent as subject to the provisions of G.S. 115C-276(a).

(16) To Remove a Superintendent or Committeeman, When Necessary. — Local boards of education shall remove a superintendent or a committeeman for cause, pursuant to the provisions of G.S. 115C-59 and 115C-274(a).

(17) To Employ Assistant Superintendents and Supervisors. — Local boards of education have the authority to employ assistant superintendents and supervisors pursuant to the provisions of G.S. 115C-278 and 115C-284(g).

(18) To Make Rules Concerning the Conduct and Duties of Personnel. — Local boards of education, upon the recommendation of the superintendent, shall have full power to make all just and needful rules and regulations governing the conduct of teachers, principals, and supervisors, the kind of reports they shall make, and their duties in the care of school property.

(19) To Approve the Assignment of Duties to an Assistant Principal. — Local boards of education shall permit certain duties of the principal to be assigned to an assistant or acting principal pursuant to the provisions of G.S. 115C-289.

(20) To Provide for Training of Teachers. — Local boards of education are authorized to provide for the training of teachers as provided in G.S. 115C-300.

(21) To Pay School Employees. — It is the duty of every local board of education to provide for the prompt monthly payment of all salaries due teachers and other school officials and employees, and of all current bills and other necessary operating expenses. Local boards shall provide the State Board with any information needed by it to ensure the prompt monthly payment of employees of local boards who are paid through the centralized payroll system established under G.S. 115C-12(18). All salaries and bills shall be paid as provided by law for disbursing State and local funds.

The local board shall determine salary schedules of employees pursuant to the provisions of G.S. 115C-273, 115C-285(b), 115C-302(b) and 115C-316(b).

For employees not paid through the centralized payroll system, the authority for local boards of education to issue salary vouchers shall be a monthly payroll prepared on forms furnished by the State Board of Education and containing all information required by the controller of the State Board of Education. This monthly payroll shall be signed by the principal of each school.

(22) To Provide School Food Services. — Local boards of education shall provide, to the extent practicable, school food services as provided in Part 2 of Article 17 of this Chapter.

(23) To Purchase Equipment and Supplies. — They shall contract for equipment and supplies pursuant to the provisions of G.S. 115C-522(a).

(24) Purchase of Activity Buses with Local Capital Outlay Tax Funds. — Local boards of education are authorized to purchase activity buses with local capital outlay tax funds, and are authorized to maintain these buses in the county school bus garage. Reimbursement to the State Public School Fund shall be made for all maintenance cost including labor, gasoline and oil, repair parts, tires and tubes, antifreeze, etc. Labor cost reimbursements and local funds may be used to employ additional mechanics so as to insure that all activity buses

§ 115C-47 is set out twice. See section heading for effective dates.

owned and operated by local boards of education are maintained in a safe mechanical condition. The State Board of Education shall inspect each activity bus and recommend to the board whether the bus should be replaced but replacements will be determined by the local board of education. Such replacement units for activity buses shall be financed with local funds.

(25) To Secure Liability Insurance. — Local boards of education are authorized to secure liability insurance, as provided in G.S. 115C-42, so as to waive their immunity for liability for certain negligent acts of their employees.

(26) If a local board of education provides access to its buildings and campus and the student information directory to persons or groups which make students aware of occupational or educational options, the local board of education shall provide access on the same basis to official recruiting representatives of the military forces of the State and of the United States for the purpose of informing students of educational and career opportunities available in the military.

(27) To Provide Retirement Age. — The local board of education may by resolution provide that every administrative officer whom it elects and every certificated personnel who serve that local school administrative unit shall retire on July 1, coincident with or next following their seventieth birthday, unless continued in service on a year-to-year basis in accordance with regulations adopted by the local board of education. (1955, c. 1372, art. 5, ss. 18, 28, 30, 33; art. 6, s. 6; art. 17, s. 6; c. 1185, 1959, c. 1294; 1963, c. 425; c. 688, s. 3; 1965, c. 584, ss. 4, 6; c. 1185, s. 1; 1969, c. 517, s. 2; c. 539; 1973, c. 770, ss. 1, 2; c. 782, s. 31; 1975, c. 150, s. 1; c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; c. 901, s. 1; 1983 (Reg. Sess., 1984), c. 1019, s. 2.1; c. 1034, s. 16.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 115C-47.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1019, s. 2.1, effective October 1, 1984, added subdivision (27).

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 16, effective July 1, 1985, in the first paragraph of subdivision (21) substituted "It is" for "It shall be" at the beginning of the first sentence and inserted the present second sentence, and in the third paragraph of subdivision (21) rewrote the first sentence, which read "The authority for boards of education to issue salary vouchers to all school employees, whether paid from State or local funds, shall be a monthly payroll prepared on forms furnished by the State Board of Education and containing all information required by the Controller of the State Board of Education."

§ 115C-47 is set out twice. See section heading for effective dates.

SUBCHAPTER IV. EDUCATION PROGRAM.

ARTICLE 8.

General Education.

Part 1. Courses of Study.

§ 115C-81. Required curriculum.

(a) Standard Course of Study. — It is the policy of the State of North Carolina to insure a quality education to every child residing in North Carolina. To this end, the General Assembly directs the State Board of Education to develop a standard course of study to be offered to every child in North Carolina public schools and to submit the proposed standard course of study to the General Assembly by October 15, 1984.

The standard course of study shall reflect a rigorous academic course of study stressing mastery of integrated knowledge based on mastery of competencies in the basic skill areas rather than the study of isolated disciplines. To this end, the State Board of Education is directed to undertake a statewide audit of current curricula and to refine the curricula as required to comply with this policy. The standard course of study:

(1) Shall stress mastery of integrated knowledge;
(2) Should provide students with the specific competencies needed to gain employment or to continue their education;
(3) Should provide students with the skills necessary to cope with contemporary society;
(4) Shall contain a vocational education component designed to meet the State's and local anticipated career training needs;
(5) Shall provide for a program of continuous learning based upon the individual child's need, interest, and stages of development, so that the program has a nongraded structure of organization;
(6) Shall set forth what subjects shall be taught in each grade, and outline the basal and supplementary books on each subject to be used in each grade;
(7) Shall include a core curriculum for all students plus additional elective curriculum choices to meet the varied needs and interests of students;
(8) Shall establish a minimum length of the instructional day;
(9) Shall prescribe standards for student performance and promotion and may consider appropriate levels at which remediation should begin; and
(10) Shall describe appropriate class sizes for each course required by the standard course of study; staffing levels to support the standard course of study, and may include minimum staffing for schools, regardless of size, where such schools are determined to be essential to serve pupils located in isolated geographic areas; minimum facility requirements for the standard course of study; minimum material requirements for the standard course of study; and such other information the Board finds necessary to enable the General Assembly to allocate appropriate resources to implement the plan.

The Superintendent shall prepare a course of study for each grade of the school system which shall outline the appropriate subjects to be taught, together with directions as to the best methods of teaching them as guidance for the teachers. There shall be included in the course of study for each grade, outlines and suggestions for teaching the subject of Americanism; and in one or more grades, as directed by the Superintendent of Public Instruction,

outlines for the teaching of the dangers of harmful or illegal drugs, including alcohol; and, in one or more grades at the high school level, outlines for the teaching of the free enterprise system.

The Superintendent shall report to the Joint Legislative Commission on Governmental Operations at the end of each school year on the outlines he provided for the teaching of the dangers of harmful or illegal drugs, including alcohol, and on the instruction provided by local boards of education on this subject.

Local boards of education shall require that all subjects in the course of study, except foreign languages, be taught in the English language, and any teacher or principal who shall refuse to conduct his recitations in the English language may be dismissed.

(1955, c. 1372, art. 5, s. 20; art. 23, ss. 1, 5, 6; 1957, cc. 845, 1101; 1969, c. 487, ss. 1, 2; 1971, c. 356; 1973, c. 476, s. 128; 1975, c. 65, ss. 1, 2; 1977, 2nd Sess., c. 1256, s. 1; 1981, c. 423, s. 1; 1983, c. 656, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 81; c. 1103, s. 2.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 80, provides: "The Superintendent of Public Instruction shall intensify his efforts under G.S. 115C-81(a) to provide appropriate outlines for the teaching of the dangers of harmful or illegal drugs, including alcohol.

"Local boards of education shall place more emphasis on the instruction required by G.S. 115C-81(b) on the dangers of harmful or illegal drugs, including alcohol."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 81, effective July 1, 1984, inserted the present third paragraph of subsection (a).

The 1983 (Reg. Sess., 1984) amendment by c. 1103, s. 2, effective July 6, 1984, substituted the present first and second paragraphs of subsection (a), with subdivisions (1) through (10), for a former first paragraph.

Article 9.

Special Education.

Part 1. State Policy.

§ 115C-106. Policy.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, sets out legislative findings with regard to the children identified as a class in the case of Willie M., et al. vs. Hunt, et al. The section also indicates legislative intent with regard to the expenditure of funds appropriated for the class members and provides for a supplemental reserve fund to be allocated to local education agencies to serve class members. In addition, the section sets out reporting requirements and authorizes the Department of Human Resources to ensure the provision of appropriate services to class members where a local program is not providing appropriate services.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 76, provides that in addition to reports required by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, the Department of Human Resources and Public Education shall report periodically to the Commission on Children with Special Needs, as requested by the Commission, on operations of programs to benefit Willie M. class members.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

§ 115C-109. Definition of children with special needs.

The term "children with special needs" includes, without limitation, all children from five through 18 who because of permanent or temporary mental, physical or emotional handicaps need special education, are unable to have all their needs met in a regular class without special education or related services, or are unable to be adequately educated in the public schools. Children who become 19 years old during the school year may complete that school year. It includes those who are mentally retarded, epileptic, learning disabled, cerebral palsied, seriously emotionally disturbed, orthopedically impaired, autistic, multiply handicapped, pregnant, hearing-impaired, speech-impaired, blind or visually impaired, other health impaired, and academically gifted. (1977, c. 927, s. 1; 1981, c. 423, s. 1; 1983, c. 247, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 23, 24.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "from five through 18" for "between the ages of five and 18" in the first sentence and inserted the present second sentence.

Part 7. State Schools for Hearing-Impaired Children.

§ 115C-124. Pupils admitted; education.

The Department of Human Resources shall according to such reasonable regulations as the Board of Directors may prescribe, on application, receive into the schools for the purposes of education all deaf children resident of the State who are from five through 18 years: Provided, that the Department of Human Resources may admit students who are not within the age limits set forth above when in its judgment, such admission will be in the best interests of the applicant and the facilities of the school permit such admission. Only those who are bona fide citizens or residents of North Carolina shall be eligible to and entitled to receive free tuition and maintenance. The Department may fix charges and the Board of Directors may prescribe rules whereby nonresident deaf children may be admitted, but in no event shall the admission of nonresidents in any way prevent the attendance of any eligible deaf child, resident of North Carolina. The Department shall provide for the instruction of all pupils in the branches of study now prescribed by law for the public schools of the State and in such other branches as may be of special benefit to the deaf.

The Department shall encourage the State to provide the classrooms with modern auditory training equipment, audiovisual media equipment, and any other special equipment to provide the best educational conditions for the deaf. The Department shall provide a teacher training program in the State. The Department shall provide for a comprehensive vocational and technical training program for boys and girls as may be useful to them in making themselves self-supporting. (1961, c. 968; 1963, c. 448, s. 28; 1969, c. 1279; 1971, c. 1000; 1973, c. 476, s. 165; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 23.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "from five through 18" for "between the ages of five and 18" in the first sentence.

Part 8. State School for Sight-Impaired Children.

§ 115C-128. Admission of pupils; how admission obtained.

The Department of Human Resources shall, on application, receive in the institution for the purpose of education all blind children who are residents of this State and who are from five through 18 years: Provided, that pupils who are not within the age limits above set forth may be admitted to said institution in cases in which the Department of Human Resources finds that the admission of such pupils will be beneficial to them and in cases in which there is sufficient space available for their admission in said institution: Provided, further, that the Department of Human Resources is authorized to make expenditures, out of any scholarship funds or other funds already available or appropriated, of sums of money for the use of out-of-state facilities for any student who, because of peculiar conditions or disability, cannot be properly educated at the school in Raleigh. (1881, c. 211, s. 5; Code, s. 2231; Rev., s. 4191; 1917, c. 35, s. 1; C.S., s. 5876; 1947, c. 375; 1949, c. 507; 1953, c. 675, s. 14; 1963, c. 448, s. 28; 1969, c. 749, s. 2; c. 1279; 1973, c. 476, s. 164; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 23.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "from five through 18" for "between the ages of five and 18" in the first sentence.

Article 15.

North Carolina School of Science and Mathematics.

§ 115C-222. Establishment of North Carolina School of Science and Mathematics.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 49, provides:

"Notwithstanding the provisions of Article 15 of Chapter 115C of the General Statutes or any other provision of law, effective July 1, 1984, the responsibility for the direction and operation of the North Carolina School of Science and Mathematics shall be assumed by the Board of Governors of The University of North Carolina. The Board shall, after consultation with the Board of Trustees of the School, present specific recommendations, including proposed statutory amendments, to the 1985 Session of the General Assembly with respect to placement of the School within the organizational structure of The University and any other considerations as may be required. Beginning with the 1985-86 enrollments, the Board of Governors shall ensure, insofar as possible without jeopardizing admission standards, that an equal number of qualified rising high school juniors is admitted to the program and to the residential summer institutes in science and mathematics from each of North Carolina's congressional districts."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 115C-223. Board of Trustees; appointment; terms of office.

(a) The Board of Trustees of the North Carolina School of Science and Mathematics consists of the following members:

(1) Five ex officio nonvoting members: the Chairman of the State Board of Education; the Superintendent of Public Instruction; the President of the Community College System; the President of the Association of

Independent Colleges and Universities; and one member of the Board of Governors of The University of North Carolina designated by the Chairman of that Board.

(2) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1034, s. 50.

(3) Three members, one of whom shall be a superintendent of a local school administrative unit, appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121.

(4) Three members, one of whom shall be a principal of a local school administrative unit, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

(5) Fifteen members appointed by the Governor, at least 12 of whom shall be scientists and mathematicians. One of these members shall be designated by the Governor as Chairman of the Board of Trustees.

(1977, 2nd Sess., c. 1219, s. 42; 1981, c. 423, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 40-43; 1983, c. 761, s. 184; 1983 (Reg. Sess., 1984), c. 1034, s. 50.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 50(c), provides:

"Appointees appointed under G.S. 115C-223(a)(2) shall serve for the remainder of their terms; when their terms end, they shall be replaced by new appointees appointed pursuant to G.S. 115C-223(a)(3) and (4) as amended by subsection (b) of this section."

Section 50(d) of c. 1034 of Session Laws 1983 (Reg. Sess, 1984) provides:

"Notwithstanding the provisions of G.S. 116-31, the Board of Trustees of the North Carolina School of Science and Mathematics shall be as provided in G.S. 115C-223 as amended by this section."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted subdivision (a)(2), which read "Two members appointed by the Superintendent of Public Instructions: a science teacher; and a mathematics' teacher; both of whom are from within the State," and substituted "Three members" for "Two members" at the beginning of subdivisions (a)(3) and (a)(4).

SUBCHAPTER V. PERSONNEL.

ARTICLE 18.

Superintendents.

§ 115C-271. Selection by local board of education, term of office.

At a meeting to be held biennially or quadrennially during the month of April, the various county boards of education shall meet and elect a county superintendent of schools. Such superintendent shall take office on the following July 1 and shall serve for a term of two or four years, or until his successor is elected and qualified. The superintendent shall be elected for a term of either two or four years, which term shall be in the discretion of the county board of education. The county board of education may, with the written consent of the current superintendent, extend or renew the term of the superintendent's contract at any time during the final year of his term. Provided, however, in any year when new members are to be elected or appointed, the board may not act until after the new members have been sworn in. The term and conditions of employment shall be stated in a written contract which shall be entered into between the board of education and the superintendent.

A copy of the contract shall be filed with the Superintendent of Public Instruction before any person is eligible for this office.

It is the policy of the State of North Carolina that the superintendents of each of the several school administrative units be hired solely at the discretion of the local boards of education and that a candidate for superintendent of a local school administrative unit must have been, at least, a principal in a North Carolina public school or have equivalent experience as prescribed by the State Board of Education and have other minimum credentials, educational prerequisities and experience requirements as the State Board of Education shall prescribe. The State Board of Education is directed to promulgate prerequisites for candidacy for superintendent not later than January 1, 1985.

If any board of education shall elect a person to serve as superintendent of schools in any local school administrative unit who is not qualified, or cannot qualify, according to this section, such election is null and void and it shall be the duty of such board of education to elect a person who can qualify.

In all city administrative units, the superintendent of schools shall be elected by the city board of education of such unit, to serve for a period of either two or four years, which term of office shall be within the discretion of the board; and the qualifications, provisions and approval shall be the same as for county superintendents. The city board of education may, with the written consent of the current superintendent, extend or renew the term of the superintendent's contract at any time during the final year of his term: Provided, however, in any year when new members are to be elected or appointed, the board may not act until after the new members have been sworn in. The election shall be held biennially or quadrennially, as the case may be, during the month of April. (1981, c. 423, s. 1; 1983, c. 478; 1983 (Reg. Sess., 1984), c. 1103, s. 3.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Second School Reform Act of 1984'."

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 5, provides:

"The State Board of Education shall develop and recommend to the General Assembly by March 1, 1986, a quality assurance program for all administrators, similar to the programs for beginning and experienced teachers, in order to provide principals and superintendents with opportunities to develop effective management skills. In the development of this recommendation, the State Board of Education shall consult with local boards of education, on a continuous and systematic basis, through a process designed by the State Board, to assure participation on the part of a number of local boards of various sizes throughout the State. In addition, the State Board shall consult with and/or employ such public and private agencies, organizations and professional organizations as it deems necessary to accomplish this policy."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added the language beginning "and that a candidate for superintendent" at the end of the first sentence of the second paragraph, inserted the present second sentence of the second paragraph, and deleted a former second sentence of the second paragraph, which read "However, a candidate for superintendent of a local school administrative unit must meet the minimum educational and experience requirements established by the State Board of Education."

Article 19.

Principals and Supervisors.

§ 115C-284. Method of selection and requirements.

(d1) It is the policy of the State of North Carolina that, subsequent to the adoption of a system of classroom teacher differentiation and prerequisites to candidacy for principal, a classroom teacher must have attained at least the second level of differentiation, have at least four years of classroom teaching

experience, and possess, at least, a Masters Degree in Education Administration. This subsection shall not apply to educational personnel certified as of July 1, 1984.

(1955, c. 1372, art. 5, ss. 4, 27; art. 6, s. 6; art. 18, ss. 1-4; 1963, c. 688, s. 3; 1965, c. 584, ss. 6, 20.1; 1969, c. 539; 1971, c. 1188, s. 1; 1973, cc. 236, 733; c. 770, ss. 1, 2; 1975, c. 437, s. 7; c. 686, s. 1; c. 731, ss. 1, 2; c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1103, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 971, s. 4, provides:

"(a) The State Board of Education shall develop a career growth program for teachers designed to give teachers increasing responsibility, recognition and pay as they gain experience and professional ability. The program shall provide a series of salary classifications based on an individual's initiative and desire to increase his professional abilities and his success in doing so. The program shall provide for annual methods of examination of teachers with peer participation in the review, opportunities to correct deficiencies, and dismissal of teachers who after ample opportunities cannot or will not perform. Peers participating in the review shall not live in the same local school administrative unit as the teacher reviewed. The State Board shall devise methods and instruments of evaluation that will determine what levels of performance, effort and ability and what accomplishments warrant different salary classifications and at what point failure to rehire a nontenured teacher or dismissal or demotion of a tenured teacher is appropriate.

"The State Board of Education shall also develop a career growth program for principals and other certified school administrators designed to give principals and other school administrators clear opportunities for advancement, recognition and increased pay if they demonstrate high effectiveness as instructional leaders and school managers. The program shall provide a series of salary classifications based on an individual's initiative and desire to increase his professional abilities and his success in doing so. The program shall provide for annual examinations by other administrators and the people he supervises, opportunities to correct deficiencies, and dismissal or reassignment of employees who after ample opportunity cannot or will not perform. The State Board shall devise methods and instruments of evaluation that will determine what levels of performance, effort and ability and what accomplishments warrant different salary classifications and at what point dismissal or reassignment of a principal or other administrator is appropriate.

"(b) The State Board of Education shall submit to the Education Policy Council, on or before November 1, 1984, a preliminary report on the career growth pilot programs it has developed pursuant to subsection (a) of this section. No later than five days after the convening date of the 1985 General Assembly, the State Board shall submit a report for the approval of the General Assembly on the career growth pilot programs it has developed pursuant to subsection (a) of this section to the President of the Senate, the Speaker of the House, the President Pro Tempore of the Senate, the Speaker Pro Tempore of the House, the Majority Leader of the Senate and the Chairmen of the Base and Expansion Appropriations Committees of the Senate and the House.

"(c) The General Assembly finds that it is essential to attract and retain the best people in teaching and in school administration. A system that is perceived to offer low wages, lifetime contracts, little real evaluation and no extra pay for outstanding performance cannot do that; therefore, the General Assembly directs the State Board of Education to implement the programs it develops, as approved by the General Assembly, pursuant to subsection (a) of this section by July 1, 1986. Any statutes that would prevent the State Board from doing so are repealed to the extent they conflict with this section. It is the intent of the General Assembly to make all future salary increments to teachers and principals and other certified school administrators an integral part of the career growth programs; therefore, no funds for annual increments, cost-of-living increases, or other salary increments for teachers shall be appropriated for certificated personnel of the public schools until these pilot career development programs are implemented."

Session Laws 1983 (Reg. Sess., 1984), c. 971, s. 8, makes the act effective July 1, 1984, except as otherwise provided.

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 5, provides: "The State Board of Education shall develop and recommend to the General

Assembly by March 1, 1986, a quality assurance program for all administrators, similar to the programs for beginning and experienced teachers, in order to provide principals and superintendents with opportunities to develop effective management skills. In the development of this recommendation, the State Board of Education shall consult with local boards of education, on a continuous and systematic basis, through a process designed by the State Board, to assure participation on the part of a number of local boards of various sizes throughout the State. In addition, the State Board shall consult with and/or employ such public and private agencies, organizations and professional organizations as it deems necessary to accomplish this policy."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (d1).

Article 20.

Teachers.

§ 115C-295. Minimum age and certificate prerequisites.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 971, s. 4, provides:

"(a) The State Board of Education shall develop a career growth program for teachers designed to give teachers increasing responsibility, recognition and pay as they gain experience and professional ability. The program shall provide a series of salary classifications based on an individual's initiative and desire to increase his professional abilities and his success in doing so. The program shall provide for annual methods of examination of teachers with peer participation in the review, opportunities to correct deficiencies, and dismissal of teachers who after ample opportunities cannot or will not perform. Peers participating in the review shall not live in the same local school administrative unit as the teacher reviewed. The State Board shall devise methods and instruments of evaluation that will determine what levels of performance, effort and ability and what accomplishments warrant different salary classifications and at what point failure to rehire a nontenured teacher or dismissal or demotion of a tenured teacher is appropriate.

"The State Board of Education shall also develop a career growth program for principals and other certified school administrators designed to give principals and other school administrators clear opportunities for advancement, recognition and increased pay if they demonstrate high effectiveness as instructional leaders and school managers. The program shall provide a series of salary classifications based on an individual's initiative and desire to increase his professional abilities and his success in doing so. The program shall provide for annual examinations by other administrators and the people he supervises, opportunities to correct deficiencies, and dismissal or reassignment of employees who after ample opportunity cannot or will not perform. The State Board shall devise methods and instruments of evaluation that will determine what levels of performance, effort and ability and what accomplishments warrant different salary classifications and at what point dismissal or reassignment of a principal or other administrator is appropriate.

"(b) The State Board of Education shall submit to the Education Policy Council, on or before November 1, 1984, a preliminary report on the career growth pilot programs it has developed pursuant to subsection (a) of this section. No later than five days after the convening date of the 1985 General Assembly, the State Board shall submit a report for the approval of the General Assembly on the career growth pilot programs it has developed pursuant to subsection (a) of this section to the President of the Senate, the Speaker of the House, the President Pro Tempore of the Senate, the Speaker Pro Tempore of the House, the Majority Leader of the Senate and the Chairmen of the Base and Expansion Appropriations Committees of the Senate and the House.

"(c) The General Assembly finds that it is essential to attract and retain the best people in teaching and in school administration. A system that is perceived to offer low wages, lifetime contracts, little real evaluation and no extra pay for outstanding performance cannot do that; therefore, the General Assembly directs the State Board of Education to implement the programs it develops, as approved by the General Assembly, pursuant to subsection (a) of this section by July 1, 1986. Any statutes that would prevent the State Board from doing so are repealed to the extent they conflict with this section. It is the intent of the General Assembly to make all future salary increments to teachers and principals and other certified school administrators an integral part of the career growth programs; therefore, no funds for annual increments, cost-of-living increases, or

other salary increments for teachers shall be appropriated for certificated personnel of the public schools until these pilot career development programs are implemented."

Session Laws 1983 (Reg. Sess., 1984), c. 971, s. 8, makes the act effective July 1, 1984, except as otherwise provided.

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 7, provides: "The State Board of Education may recommend to the General Assembly a program of expanded on-the-job training for public school employees. This recommendation may include individual training goals, the level of funding and a mechanism to evaluate the results of the training efforts." Section 1 of c. 1103 provides that the act may be referred to as the "Elementary and Secondary School Reform Act of 1984."

§ 115C-296. Board sets certification requirements.

(a) The State Board of Education shall have entire control of certifying all applicants for teaching positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all certificates and shall determine and fix the salary for each grade and type of certificate which it authorizes: Provided, that the State Board of Education shall require each applicant for an initial certificate or graduate certificate to demonstrate his academic and professional preparation by achieving a prescribed minimum score at least equivalent to that required by the Board on November 30, 1972, on a standard examination appropriate and adequate for that purpose: Provided, further, that in the event the Board shall specify the National Teachers Examination for this purpose, the required minimum score shall not be lower than that which the Board required on November 30, 1972.

(b) It is the policy of the State of North Carolina to maintain the highest quality teacher education programs in order to enhance the competence of professional personnel certified in North Carolina. To the end that teacher preparation programs are upgraded to reflect a more rigorous course of study, the State Board of Education shall submit to the General Assembly not later than November 1, 1984, a plan to promote this policy. The State Board of Education, as lead agency in coordination and cooperation with the University Board of Governors, the Board of Community Colleges and such other public and private agencies as are necessary, shall continue to refine the several certification requirements, standards for approval of institutions of teacher education, standards for institution-based innovative and experimental programs, standards for implementing consortium-based teacher education, and standards for improved efficiencies in the administration of the approved programs.

(c) It is the policy of the State of North Carolina to encourage lateral entry into the profession of teaching by skilled individuals from the private sector. To this end, before the 1985-86 school year begins, the State Board of Education shall develop criteria and procedures to accomplish the employment of such individuals as classroom teachers. Regardless of credentials or competence, no one shall begin teaching above the middle level of differentiation. Skilled individuals who choose to enter the profession of teaching laterally may be granted a provisional teaching certificate for no more than five years and shall be required to obtain certification before contracting for a sixth year of service with any local administrative unit in this State. (1955, c. 1372, art. 18, s. 2; 1965, c. 584, s. 20.1; 1973, c. 236; 1975, c. 686, s. 1; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1103, s. 6.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, designated the first paragraph as subsection (a) and added subsections (b) and (c).

§ 115C-301. Allocation of teachers; class size.

(d) Upon receipt of the allotments, local boards of education shall organize schools and assign teachers to achieve the following class size maximums:

(1) No more than 26 students per teacher in average daily membership for grades one through three.

(2) No more than 29 students per teacher in average daily membership for grades four through six.

(2a) No more than 33 students per teacher in average daily membership for grades seven and eight.

(3) No more than 35 students per class except as permitted by local boards of education and no more than 150 students per day in average daily membership for teachers in high schools and junior high schools except as permitted by regional accrediting agencies.

At no time shall the number of students assigned to a class or being taught on a regular basis in a class exceed these class size maximums. Provided provisions of G.S. 115C-301(d)(3) and G.S. 115C-47(10) shall still apply.

(1955, c. 1372, art. 6, s. 6; 1963, c. 688, s. 3; 1965, c. 584, s. 6; 1969, c. 539; 1973, c. 770, ss. 1, 2; 1975, c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1034, ss. 12, 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 11, provides:

"The funds to reduce class size appropriated to the Department of Public Education in Section 2 of Chapter 971, Session Laws of 1983, shall be used to reduce the allocation formula for grades 4 through 6 from one teacher for every 30 students in average daily membership to one teacher for every 26 students in average daily membership. These funds shall not be used for administrative purposes or for any purpose except to provide additional teachers to reduce class size for grades 4 through 6 as provided in this section.

Each local board of education shall organize the schools and assign teachers so that the average ratio of teachers to students in each of the grades 4 through 6 in its local school administrative unit is no more than one to 26. At all times during the school year and the school day, the local board shall assure that the number of students assigned to each class and the number being taught on a regular basis in each class are such that this average ratio is not exceeded."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted present subdivisions (d)(2) and (d)(2a) for former subdivision (d)(2), which read "No more than 33 students per teacher in average daily membership for the upper elementary grades," and added the last two sentences of subsection (d).

§ 115C-302. Salary and vacation.

(e) It is the policy of the State of North Carolina to enhance the teaching profession by providing teachers with career opportunities that do not remove them from the classroom; to encourage the development and implementation of a professional salary schedule that complements the system of differentiation; to have salaries of professional educators in elementary and secondary schools based upon performance, degree attained, differentiation and the needs of the local school administrative unit; and to begin, in the school year beginning in 1986, a differential salary system based upon performance, differentiation, local availability of classroom teachers, geographical location of the employing local school administrative unit and such other factors as the local board of education shall deem necessary.

Performance shall be measured by standardized evaluations which are routinely administered pursuant to G.S. 115C-326 by competent and trained administrators who have themselves demonstrated meritorious performance

in the classroom. Differentiation shall be based upon superior performance over a period of time plus other responsibilities. Needs of the local school administrative unit over and above the standard course of study shall be defined by the local board of education exclusively funded from revenues provided at the discretion of the board of county commissioners or from other local funds under the control of the local board of education.

Each salary may include a local variable component, determined locally and based upon the needs and condition of the local school administrative unit. This local variable component shall be paid from local revenue. (1955, c. 1372, art. 5, s. 32; art. 17, s. 9; art. 18, ss. 6, 7; 1961, c. 1085; 1965, c. 584, ss. 3, 16; 1971, c. 1052; 1973, c. 315, s. 2; c. 647, s. 1; 1975, cc. 383, 608; c. 834, ss. 1, 2; 1979, c. 600, ss. 1-5; 1981, c. 423, s. 1; c. 639, s. 1; c. 947, s. 1; 1983, c. 761, s. 90; c. 768, s. 9; c. 872, ss. 3, 4; 1983 (Reg. Sess., 1984), c. 1103, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (e).

§ 115C-307. Duties of teachers.

CASE NOTES

Applied in Faulkner v. New Bern-Craven County Bd. of Educ., 65 N.C. App. 483, 309 S.E.2d 548 (1983).

Article 21.

Other Employees.

§ 115C-315. Hiring of school personnel.

(b) Election by Local Boards. — School personnel shall be elected by the local board of education upon the recommendation of the superintendent, in accordance with the provisions of G.S. 115C-276(j).

It is the policy of the State of North Carolina to encourage and provide for the most efficient and cost-effective method of meeting the needs of local school administrative units for noncertified support personnel. To this end, the State Board of Education shall recommend to the General Assembly by November 1, 1984, a system using factors and formulas to determine the total number of noncertified support personnel allotted to local school administrative units. The recommended system for allotting noncertified support personnel shall include the proposed State's funding obligation for these positions and shall be developed in consultation with school-based support personnel or their representatives.

(1955, c. 1372, art. 5, s. 4; art. 18, ss. 1-4; 1965, c. 584, s. 20.1; 1973, c. 236; 1975, c. 437, s. 7; c. 686, s. 1; c. 731, ss. 1, 2; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1103, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added the second paragraph of subsection (b).

§ 115C-318. Liability insurance for nonteaching public school personnel.

Editor's Note.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 73, provides:

"Funds to be used for the purpose set out in Section 3 of Chapter 1399 of the 1981 Session Laws shall be allocated to local school administrative units based on the number of State-allotted personnel covered."

ARTICLE 22.

General Regulations.

Part 3. Principal and Teacher Employment Contracts.

§ 115C-325. System of employment for public school teachers.

(p) Repealed by Session Laws 1983 (Regular Session 1984) c. 1034, s. 34. (1955, c. 664; 1967, c. 223, s. 1; 1971, c. 883; c. 1188, s. 2; 1973, c. 315, s. 1; c. 782, ss. 1-30; 1979, c. 864, s. 2; 1981, c. 423, s. 1; c. 538, ss. 1-3; c. 731, s. 1; c. 1127, ss. 39, 40; 1981 (Reg. Sess., 1982), c. 1282, s. 30; 1983, c. 770, ss. 1-15; 1983 (Reg. Sess., 1984), c. 1034, s. 34.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted subsection (p), which formerly made this section applicable to certain institutions.

CASE NOTES

Applied in Davidson v. Winston-Salem/Forsyth County Bd. of Educ., 62 N.C. App. 489, 303 S.E.2d 202 (1983); Faulkner v. New Bern-Craven County Bd. of Educ., 65 N.C. App. 483, 309 S.E.2d 548 (1983); Nestler v. Chapel Hill/Carrboro City Schools Bd. of Educ., — N.C. App. —, 311 S.E.2d 57 (1984); Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

§ 115C-326. Performance standards and criteria for professional employees; law suits arising out of this section.

(c) The State Board of Education shall recommend to the General Assembly by December 1, 1986, a program to remedy deficiencies and difficulties revealed through the evaluation process required by this section and to develop new skills on the part of classroom teachers. (1979, 2nd Sess., c. 1137, s. 35; 1981, c. 423, s. 1; c. 859, s. 29.12; 1981 (Reg. Sess., 1982), c. 1282, s. 32.1; 1983 (Reg. Sess., 1984), c. 1103, § 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (c).

§ 115C-326.1. Differentiation of classroom teachers.

(a) It is the policy of the State of North Carolina to encourage differentiation of classroom teachers. The State Board of Education shall consult with local boards of education, on a continuous and systematic basis through a process designed by the State Board to assure participation on the part of a number of local boards of various sizes throughout the State. In addition, the State Board shall consult with such other public and private agencies, organizations and professional organizations as it deems necessary to accomplish this policy. After the consultation process, the State Board shall adopt a policy defining at least five categories of differentiated staffing for classroom teachers.

The State Board may pilot test this career growth program for classroom teachers in at least one school administrative unit in each of the eight educational districts of the State during the 1985-86 school year and shall recommend a system of differentiation to be applied consistently throughout the State beginning in the 1986-87 school year. This recommendation shall be submitted to the General Assembly on or before March 1, 1986.

(b) Criteria for differentiation shall include performance and may include such other criteria as the State Board of Education deems necessary; such as degree obtained, number of subjects taught, number of classes taught, number of students taught in a school day and time in service.

(c) The State Board of Education, after consultation with local boards of education, shall develop such personnel policies as are required to ensure a coherent progression through the system of differentiation by those classroom teachers who elect to participate in the system of differentiation. The State Board shall develop personnel policies which prevent imbalances at any level of differentiation. If there is evidence of an imbalance or abnormality in the distribution of performance evaluations administered pursuant to G.S. 115C-326 and/or classroom teacher differentiations created and administered pursuant to this section, the State Board of Education shall be empowered to review performance evaluation and staffing pattern of a local school administrative unit to ensure reasonable distribution of performance evalutions and classroom teacher differentiations.

(d) The State Board of Education shall give consideration to methods of enhancing the quality of continuing education programs for currently certified teachers, and may include a sabbatical leave for professional improvement.

(e) Notwithstanding the above, teachers employed under the system of employment for public school teachers, G.S. 115C-325, in effect prior to July 6, 1984, shall be afforded the opportunity to elect to continue under the system of employment provided in G.S. 115C-325 and continuing under the salary schedule in existence at that time. They shall have the alternative of electing to change their conditions of employment to come within the system outlined in this section. This election shall be made on or before signing employment contracts for the 1987-88 school year. Employees whose initial contracts are for the 1986-87 or subsequent school years shall be employed under the employment system contained in this section. (1983 (Reg. Sess., 1984), c. 1103, s. 11.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 14, makes this section effective July 6, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

SUBCHAPTER VI. STUDENTS.

ARTICLE 25.

Admission and Assignment of Students.

§ 115C-366. Assignment of student to a particular school.

CASE NOTES

Constitutionality. — See Harris v. Hall, 572 F. Supp. 1054 (E.D.N.C. 1983).

§ 115C-366.1. Local boards of education; tuition charges.

(a) Local boards of education may charge tuition to the following persons:

(1) Persons of school age who are not domiciliaries of the State.

(2) Persons of school age who are domiciliaries of the State but who do not reside within the school administrative unit or district.

(3) Persons of school age who reside on a military or naval reservation located within the State and who are not domiciliaries of the State. Provided, however, that no person of school age residing on a military or naval reservation located within the State and who attends the public schools within the State may be charged tuition if federal funds designed to compensate for the impact on public schools of military dependent persons of school age are funded by the federal government at not less than fifty percent (50%) of the total per capita cost of education in the State, exclusive of capital outlay and debt service, for elementary or secondary pupils, as the case may be, of such school administrative unit.

(4) Persons who are 19 years of age or older before the beginning of the school year in which they wish to enroll.

(1981, c. 567, ss. 2-4; 1982, Ex. Sess., c. 2, ss. 1, 2; 1984 (Reg. Sess., 1984), c. 1034, s. 22.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added subdivision (a) (4).

ARTICLE 26.

Attendance.

Part 1. Compulsory Attendance.

§ 115C-378. Children between seven and 16 required to attend.

CASE NOTES

The State has a compelling interest in providing access to education for all, in order to prepare future citizens to participate effectively and intelligently in the political system and to prepare individuals to be self-reliant and self-sufficient. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Interest in Compulsory Education Outweighs Interest in Education at Home. — The State has no means by which to insure that children who are at home are receiving an education. Therefore, the State's interest in compulsory education outweighs parent's interest in educating his children at home because of religious and sociopsychological beliefs. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Stated in Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

SUBCHAPTER VII. FISCAL AFFAIRS.

ARTICLE 30.

Financial Powers of the State Board of Education.

§ 115C-408. Funds under control of the State Board of Education.

(a) It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skills demanded in the marketplace, and the skills necessary to cope with contemporary society, using State, local and other funds in the most cost-effective manner. The Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Section 7 of Article IX of the State Constitution, and also excepting such local funds as may be provided by a county, city, or district.

(b) To insure a quality education for every child in North Carolina, and to assure that the necessary resources are provided, it is the policy of the State of North Carolina to provide from State revenue sources the instructional expenses for current operations of the public school system as defined in the standard course of study.

It is the policy of the State of North Carolina that the facilities requirements for a public education system will be met by county governments.

It is the intent of the 1983 General Assembly to further clarify and delineate the specific financial responsibilities for the public schools to be borne by State and local governments. (1955, c. 1372, art. 2, s. 2; 1957, c. 541, s. 11; 1961, c. 969; 1963, c. 448, ss. 24, 27; c. 688, ss. 1, 2; c. 1223, s. 1; 1965, c. 1185, s. 2; 1967, c. 643, s. 1; 1969, c. 517, s. 1; 1971, c. 704, s. 4; c. 745; 1973, c. 476, s. 138; c. 675; 1975, c. 699, s. 2; c. 975; 1979, c. 300, s. 1; c. 935; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1103, s. 12.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, rewrote this section.

Article 31.

The School Budget and Fiscal Control Act.

Part 1. General Provisions.

§ 115C-423. Definitions.

The words and phrases defined in this section have the meanings indicated when used in this Article, unless the context clearly requires another meaning:

(6) "Vending facilities" has the same meaning as it does in G.S. 143-12.1. (1975, c. 437, s. 1; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 167.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective Oct. 1, 1984, added subdivision (6).

Part 2. Budget.

§ 115C-426.1. Vending facilities.

Moneys received by a local school administrative unit on account of operation of vending facilities shall be deposited, budgeted, appropriated, and expended in accordance with the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 168.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 175, makes this section effective Oct. 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Article 32A.

Scholarship Loan Fund for Prospective Teachers.

§ 115C-468. Establishment of fund.

There is hereby established a revolving loan fund which shall be known as the "Scholarship Loan Fund for Prospective Teachers." (1957, c. 1237; 1983 (Reg. Sess., 1984), c. 1034, s. 10.1.)

Editor's Note. — Sections 115C-468 through 115C-471 were formerly §§ 116-171 through 116-174. They were transferred to their present position by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 10.1, effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 10, allocates $400,000 to the Scholarship Loan Fund for Prospective Teachers established by this section to provide 200 scholarship loans at $2,000 each during the 1984-85 school year. Section 10 further provides: "It is the intent of the General Assembly to appropriate sufficient funds for this purpose in future fiscal years to continue each scholarship for four school years and to provide 200 new scholarships every school year through 1987-88; thus,

beginning with the 1987-88 school year, 800 scholarships would be provided each school year. All scholarships provided pursuant to this section shall be subject to the provisions of Article 18 of Chapter 116 [now Article 32A of Chapter 115C] of the General Statutes except as otherwise provided in this section and except that the criteria for awarding scholarships shall be measures of academic performance including grade point average, scores on standardized tests, class rank, and recommendations of guidance counselors. Also, an equal number of scholarships shall be awarded in each of the State's congressional districts."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 115C-469. Appropriations paid into fund; how administered.

Such funds as may be appropriated by the General Assembly to said fund or to the State Board of Education for the purpose of a student loan fund for teacher education shall be paid into the Scholarship Loan Fund for Prospective Teachers and administered by the State Board of Education and the State Superintendent of Public Instruction as follows:

During the first year of the 1957-1959 biennium, to provide for prospective teachers not to exceed 300 regular scholarship loans in the amount of not more than three hundred fifty dollars ($350.00) each, and for the second year of the biennium to provide for such persons not to exceed 600 regular scholarship loans in the amount of not more than three hundred fifty dollars ($350.00) each, and for each summer of said biennium to provide for prospective teachers and for teachers taking undergraduate courses not to exceed 200 summer school scholarship loans in the amount of not more than seventy-five dollars ($75.00) each; provided, however, the State Board of Education in its discretion may, within the funds available, vary the number and proportion of regular and summer scholarship loans to be established in any one year.

During years after the first biennium in which this fund shall be established, loans of the type and amounts provided for during the first biennium shall be made in such numbers and amounts and proportions as the State Board of Education in its discretion may prescribe within the funds available from appropriations or otherwise. (1957, c. 1237; 1983 (Reg. Sess., 1984), c. 1034, s. 10.1.)

§ 115C-470. Duration of fund; loans repaid and interest received added to fund and administered for same purposes.

The Scholarship Loan Fund for Prospective Teachers shall continue in effect until terminated by action of the General Assembly of North Carolina and such amounts of loans as shall be repaid from time to time under the provisions of this Article, together with such amounts of interest as may be received on account of loans made shall become a part of the principal amount of said loan fund and shall be administered for the same purposes and under the same provisions as are set forth herein to the end that such funds may be utilized in addition to such further amounts as may be appropriated from time to time by the General Assembly to said loan fund. (1957, c. 1237; 1983 (Reg. Sess., 1984), c. 1034, s. 10.1.)

§ 115C-471. Fund administered by State Superintendent of Public Instruction; rules and regulations.

The Scholarship Loan Fund for Prospective Teachers shall be administered by the State Superintendent of Public Instruction, under the following rules and regulations, and under such further rules and regulations as the State Board of Education shall in its discretion promulgate:

(1) Any resident of North Carolina who is interested in preparing to teach in the public schools of the State shall be eligible to apply in writing to the State Superintendent of Public Instruction for a regular scholarship loan in the amount of not more than three hundred fifty dollars ($350.00) per academic school year and any such person or any person who is teaching in the public schools of the State and is interested in taking further undergraduate courses shall be eligible to apply for a summer school scholarship loan in the amount of not more than seventy-five dollars ($75.00). Recipients of scholarship loans may attend any North Carolina college or university, public or private, which offers teacher training or work leading to teacher training and which is approved by the State Board of Education; except that scholarship loans may not be used in obtaining credit through correspondence or extension courses.

(2) All scholarship loans shall be evidenced by notes made payable to the State Board of Education which shall bear interest at the rate of six percent (6%) per annum from and after September 1 following fulfillment by a prospective teacher of the requirements for a teacher's certificate based upon the bachelor's degree; or in the case of persons already teaching in the public schools who obtain scholarship loans such notes shall bear interest at the prescribed rate from and after September 1 of the school year beginning immediately after the use of such scholarship loans; or in the event any such scholarship shall be terminated under the provisions of subdivision (3) of this section then such notes shall bear interest from the date of such termination. A minor recipient who signs such note or notes shall also obtain the endorsement thereon by a parent, if there be a living parent, unless such endorsement is waived by the Superintendent of Public Instruction. Such minor recipient shall be obligated upon such note or notes as fully as if he or she were of age and shall not be permitted to plead such minority as a defense in order to avoid the obligations undertaken upon such note or notes.

(3) Each recipient of a scholarship loan under the provisions of this program shall be eligible for scholarship loans each year until he has qualified for a teacher's certificate based upon the bachelor's degree, but he shall not be so eligible for more than four years nor after qualifying for said certificate. The permanent withdrawal of any recipient from college or failure of such recipient to do college work in a manner acceptable to the State Superintendent of Public Instruction will immediately forfeit such recipient's right to retain such scholarship and subject such scholarship to termination by the State Superintendent of Public Instruction in his discretion. All terminated scholarships shall be regarded as vacant and subject to being awarded to other eligible persons.

(4) Except under emergency conditions applicable to the State Superintendent of Public Instruction, recipients of scholarship loans shall enter the public school system of North Carolina or shall become regularly employed as teachers in schools operated by the United States government on military reservations in the State of North

Carolina at the beginning of the next school term after qualifying for a teacher certificate based upon the bachelor's degree or in case of persons already teaching in the public schools or in schools operated by the United States government on military reservations in North Carolina at the beginning of the next school term after the use of such loan. All teaching service for which the recipient of any scholarship loan is obligated shall be rendered within seven years after the completion of the use of each such scholarship loan.

(5) For each full school year taught in a North Carolina public school or in a school operated by the United States government on the military reservation in the State of North Carolina, the recipient of a scholarship loan shall receive credit upon the amount due by reason of such loan equal to all interest accrued upon the loan to that time plus a credit of three hundred fifty dollars ($350.00) upon the principal amount of such obligation or such lesser amount as may remain due upon said principal; provided, however, that in lieu of teaching in the public school or in any school operated by the United States government on a military reservation in North Carolina, a recipient may elect to pay in cash the full amount of scholarship loans received plus interest then due thereon or any part thereof which has not been canceled by the State Board of Education by reason of teaching service rendered.

(6) If any recipient of a scholarship loan who is fulfilling his obligation under subdivision (4) of this section dies within the seven-year period, or if any recipient dies during the period of attendance at a college or university under a scholarship loan, any balance that has not been discharged through service shall be automatically canceled.

If any recipient of a scholarship loan fails to fulfill his obligations under subdivision (4) of this section, other than as provided above, the amount of his loan and accrued interest, if any, shall be due and payable from the time of failure to fulfill such obligations.

(7) The State Superintendent of Public Instruction shall award scholarship loans with due consideration to such factors and circumstances as: aptitude, purposefulness, scholarship, character, financial need, and areas or subjects of instruction in which the demands for teachers are greatest. Since the primary purpose of this Article is to attract worthy young people to the teaching profession, preference shall be given to high school seniors in the awarding of scholarships. (1957, c. 1237; 1973, c. 581, ss. 1, 2; 1975, c. 750, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 10.1.)

§ 115C-472. State policy.

It is the policy of the State of North Carolina to encourage entry into the teaching profession by those who are prepared to teach in those areas where teachers are most needed. To this end, the State Board of Education shall recommend to the General Assembly by November 1, 1984, a method of providing loan and scholarship assistance to prospective teachers in areas of anticipated shortage.

This recommendation shall include, at least, the anticipated needs, the level of funding and a mechanism to evaluate the results of the program. (1983 (Reg. Sess., 1984), c. 1103, s. 13.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 14, makes this section effective July 6, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1103, s. 1, provides: "This act may be referred to as the 'Elementary and Secondary School Reform Act of 1984'."

SUBCHAPTER X. PRIVATE AND PROPRIETARY SCHOOLS.

ARTICLE 39.

Nonpublic Schools.

Part 1. Private Church Schools and Schools of Religious Charter.

§ 115C-547. Policy.

CASE NOTES

Cited in Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

§ 115C-548. Attendance; health and safety regulations.

CASE NOTES

State has a compelling interest in providing access to education for all, in order to prepare future citizens to participate effectively and intelligently in the political system and to prepare individuals to be self-reliant and self-sufficient. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Interest in Compulsory Education Outweighs Interest in Education at Home. — The State has no means by which to insure that children who are at home are receiving an education. Therefore, the State's interest in compulsory education outweighs parent's interest in educating his children at home because of religious and sociopsychological beliefs. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Applied in Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

§ 115C-549. Standardized testing requirements.

CASE NOTES

Applied in Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

§ 115C-550. High school competency testing.

CASE NOTES

Applied in Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

§ 115C-554. Requirements exclusive.

CASE NOTES

State has a compelling interest in providing access to education for all, in order to prepare future citizens to participate effectively and intelligently in the political system and to prepare individuals to be self-reliant and self-sufficient. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Interest in Compulsory Education Outweighs Interest in Education at Home. — The State has no means by which to insure that children who are at home are receiving an education. Therefore, the State's interest in compulsory education outweighs parent's interest in educating his children at home because of religious and sociopsychological beliefs. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Part 2. Qualified Nonpublic Schools.

§ 115C-555. Qualification of nonpublic schools.

CASE NOTES

Applied in Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

§ 115C-556. Attendance; health and safety regulations.

CASE NOTES

State has a compelling interest in providing access to education for all, in order to prepare future citizens to participate effectively and intelligently in the political system and to prepare individuals to be self-reliant and self-sufficient. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Interest in Compulsory Education Outweighs Interest in Education at Home. — The State has no means by which to insure that children who are at home are receiving an education. Therefore, the State's interest in compulsory education outweighs parent's interest in educating his children at home because of religious and sociopsychological beliefs. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

§ 115C-557. Standardized testing requirements.

CASE NOTES

Applied in Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

ARTICLE 40.

Proprietary Schools.

§ 115C-575: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 17, effective June 27, 1984.

Chapter 115D.

Community Colleges and Technical Institutes.

Article 1.

General Provisions for State Administration.

Sec.

115D-2. Definitions.
115D-3. (Effective July 1, 1985) Department of Community Colleges; staff; advisory council.
115D-5. Administration of institutions by State Board of Community Colleges; personnel exempt from State Personnel Act; extension courses; tuition waiver; in-plant training; contracting, etc., for establishment and operation of extension units of the community college system; use of existing public school facilities; approval of new programs.

Article 3.

Financial Support.

115D-39. Student tuition and fees.
115D-40. Community College Scholarship Fund.
115D-41 to 115D-44. [Reserved.]

Article 4A.

Budgeting, Accounting, and Fiscal Management.

115D-58.13. Vending facilities.
115D-58.14 to 115D-58.17. [Reserved.]

Article 1.

General Provisions for State Administration.

§ 115D-2. Definitions.

As used in this Chapter:

(8) "Vending facilities" has the same meaning as it does in G.S. 143-12.1. (1963, c. 448, s. 23; 1969, c. 562, s. 2; 1973, c. 590, s. 1; 1979, c. 462, s. 2; c. 553; c. 896, s. 1; 1979, 2nd Sess., c. 1130, s. 1; 1983, c. 761, s. 104; 1983 (Reg. Sess., 1984), c. 1034, s. 169.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective Oct. 1, 1984, added subdivision (8).

§ 115D-3. (Effective July 1, 1985) Department of Community Colleges; staff; advisory council.

The Department of Community Colleges shall be a principal administrative department of State government under the direction of the State Board of Community Colleges, and shall be separate from the free public school system of the State and the Department of Public Education. The State Board shall have authority to adopt and administer all policies, regulations, and standards which it may deem necessary for the operation of the Department.

The State Board shall elect a State President of the Department of Community Colleges. He shall be the chief administrative officer of the Department. The compensation of this position shall be fixed by the General Assembly in the Current Operations Appropriations Act.

The State President shall be assisted by such professional staff members as may be deemed necessary to carry out the provisions of this Chapter, who shall be elected by the State Board on nomination of the State President. The com-

pensation of the staff members elected by the Board shall be fixed by the Governor and State Board of Community Colleges after consultation with the Advisory Budget Commission. These staff members shall include such officers as may be deemed desirable by the State President and State Board. Provision shall be made for persons of high competence and strong professional experience in such areas as academic affairs, public service programs, business and financial affairs, institutional studies and long-range planning, student affairs, research, legal affairs, health affairs and institutional development, and for State and federal programs administered by the State Board. In addition, the State President shall be assisted by such other employees as may be needed to carry out the provisions of this Chapter, who shall be subject to the provisions of Chapter 126 of the General Statutes. The staff complement shall be established by the State Board on recommendation of the State President to insure that there are persons on the staff who have the professional competence and experience to carry out the duties assigned and to insure that there are persons on the staff who are familiar with the problems and capabilities of all of the principal types of institutions represented in the system. The State Board of Community Colleges shall have all other powers, duties, and responsibilities delegated to the State Board of Education affecting the Department of Community Colleges not otherwise stated in this Chapter. (1963, c. 448, s. 23; 1971, c. 1244, s. 14; 1975, c. 699, s. 5; 1979, c. 462, s. 2; c. 896, s. 3; 1979, 2nd Sess., c. 1130, ss. 1, 2; 1981, c. 859, s. 35.2; 1983, c. 479, s. 4; c. 717, s. 26; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

§ 115D-5. Administration of institutions by State Board of Community Colleges; personnel exempt from State Personnel Act; extension courses; tuition waiver; in-plant training; contracting, etc., for establishment and operation of extension units of the community college system; use of existing public school facilities; approval of new programs.

(f) A community college or technical institute may not offer a new program without the approval of the State Board of Community Colleges except that approval shall not be required if the tuition for the program will fully cover the cost of the program. If at any time tuition fails to fully cover the cost of a program that falls under the exception, the program shall be discontinued unless approved by the State Board of Community Colleges. If a proposed new program would serve more than one community college or technical institute, the State Board of Community Colleges shall perform a feasibility study prior to acting on the proposal.

The State Board of Community Colleges shall report on an annual basis to the Governor, Lieutenant Governor, the Speaker of the House of Representatives, the Joint Legislative Commission on Governmental Operations, and the Advisory Budget Commission on all new programs it approved during the year.

The report shall include the specific reasons for which each program was approved. (1963, c. 488, s. 23; 1967, c. 652; 1969, c. 1294; 1973, c. 768; 1975, c. 882; 1977, c. 1065; 1979, c. 462, s. 2; c. 896, ss. 5-7; 1979, 2nd Sess., c. 1130, s. 1; 1981, c. 609; c. 859, s. 35.1; c. 897; c. 1127, s. 43; 1983, c. 717, s. 28; 1983 (Reg. Sess., 1984), c. 1034, ss. 45, 46.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the last clause of the catchline and added subsection (f).

Article 3.

Financial Support.

§ 115D-31. State financial support of institutions.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 36, provides, inter alia:

"Notwithstanding the matching requirements in G.S. 116-53(b) and G.S. 115D-31, the matching requirements for the institutions receiving capital appropriations in this paragraph shall be as follows:

"(1) No institution shall be required to match State appropriations for capital projects until the funds expended for capital projects from State appropriations (excluding vocational educational funds) equal expenditures from local funds;

"(2) Funds appropriated to Isothermal Community College for the Polk County satellite and to Central Carolina Technical Institute for a classroom, lab, and shop building shall be matched dollar for dollar with cash expenditures; and

"(3) Funds appropriated to house a regional program at Southwestern Technical College shall not require a local match.

"Also, the sum of one hundred thousand dollars ($100,000) shall be allocated by the State Board of Community Colleges to fund feasibility studies for proposed new capital projects.

"The sum of three million five hundred thirty thousand dollars ($3,530,000) allocated to Southwestern Technical College in this section shall be used to construct a Regional Allied Health and Geriatrics Training Center. The Center will serve a regional, multi-county area in Western North Carolina; therefore, this allocation is exempt from matching requirements in accordance with G.S. 116-53(b) and G.S. 115D-31. A committee consisting of the Chancellor of Western Carolina University, the Presidents of Southwestern Technical College, Haywood Technical College, and Tri-County Community College, or their designees, and two faculty members of Western Carolina University shall coordinate the services offered by the Center to avoid overlapping and duplicative efforts involving allied health and geriatrics training by these four institutions."

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 110.1, provides:

"Notwithstanding the matching requirements in Section 36 of Chapter 1034 of the 1983 Session Laws, Tri-County Community College shall not be required to provide matching funds for capital appropriations as allocated to the Tri-County Community College in Section 36 of Chapter 1034 of the 1983 Session Laws."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 and c. 1116, s. 115, are severability clauses.

§ 115D-39. Student tuition and fees.

The State Board of Community Colleges shall fix and regulate all tuition and fees charged to students for applying to or attending any institution pursuant to this Chapter.

The receipts from all student tuition and fees, other than student activity fees, shall be State funds and shall be deposited as provided by regulations of the State Board of Community Colleges.

The legal resident limitation with respect to tuition, set forth in G.S. 116-143.1 and 116-143.3, shall apply to students attending institutions operating pursuant to this Chapter. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1; 1981, c. 157, s. 4; 1983 (Reg. Sess., 1984), c. 1034, s. 58.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "116-143.3" for "116-143.2" in the last paragraph.

§ 115D-40. Community College Scholarship Fund.

(a) A nonreverting Community College Scholarship Fund is created in the Department of Community Colleges to provide community college scholarships for needy residents of North Carolina. The State Board of Community Colleges shall adopt rules regarding administration of the Fund and eligibility for scholarships from it. The Department of Community Colleges shall administer the Fund. The Department of Community Colleges shall make an effort to assure that the scholarships are distributed on a geographically equitable basis throughout the State among the several institutions. The principal of the Fund may not be used for any purpose; interest from the Fund may not be used for administering the Fund.

(b) Moneys in the Fund shall be deposited with the State Treasurer and administered under the provisions of G.S. 147-69.3. The State Treasurer shall make the interest earned on the moneys available to the Department of Community Colleges as needed for scholarships. (1983 (Reg. Sess., 1984), c. 1034, s. 38.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§§ 115D-41 to 115D-44: Reserved for future codification purposes.

Article 4A.

Budgeting, Accounting, and Fiscal Management.

§ 115D-58.13. Vending facilities.

Moneys received by an institution on account of operation of vending facilities shall be deposited, budgeted, appropriated, and expended in accordance with the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 170.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 175, makes this section effective Oct. 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§§ 115D-58.14 to 115D-58.17: Reserved for future codification purposes.

Chapter 116.

Higher Education.

Article 1.

The University of North Carolina.

Part 1. General Provisions.

Sec.

116-2. Definitions.

Part 2. Organization, Governance and Property of the University.

116-11. Powers and duties generally.

116-15. Licensing of certain nonpublic post-secondary educational institutions.

116-22. Definitions applicable to §§ 116-19 to 116-22.

Part 3. Constituent Institutions.

116-36.4. Vending facilities.

Article 14.

General Provisions as to Tuition and Fees in Certain State Institutions.

Sec.

116-143.3. Tuition of personnel in the armed services.

Article 18.

Scholarship Loan Fund for Prospective Teachers.

116-171 to 116-174. [Transferred.]

Article 1.

The University of North Carolina.

Part 1. General Provisions.

§ 116-2. Definitions.

As used in this Article, unless the context clearly indicates a contrary intent:

(6) "Vending facilities" has the same meaning as it does in G.S. 143-12.1.

(1971, c. 1244, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 171.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective Oct. 1, 1984, added subdivision (6).

Part 2. Organization, Governance and Property of the University.

§ 116-11. Powers and duties generally.

The powers and duties of the Board of Governors shall include the following:

(5b) The Board of Governors may by resolution provide that, until July 1, 1998, every president, vice-president, and other administrative officer of the University whom it elects and who is not subject to Chapter 126 of the General Statutes, and every chancellor, vice-chancellor, senior academic officer, senior administrative officer, and faculty member who serves a constituent institution or agency of the University and who is not subject to Chapter 126 of the General Statutes, shall retire on July 1 coincident with or next following his seventieth birthday,

unless continued in service on a year-to-year basis in accordance with regulations adopted by the Board of Governors.

(1971, c. 1244, s. 1; 1979, c. 862, s. 8; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1; 1983, c. 163; c. 717, ss. 29, 30; c. 761, s. 113; 1983 (Reg. Sess., 1984), c. 1019, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, inserted subdivision (5b).

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

§ 116-15. Licensing of certain nonpublic post-secondary educational institutions.

The General Assembly of North Carolina in recognition of the importance of higher education and of the particular significance attached to the personal credentials accessible through higher education and in consonance with statutory law of this State making unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce," hereby declares it the policy of this State that all institutions conducting post-secondary degree activity in this State that are not subject to Chapter 115 or 115D of the General Statutes, nor some other section of Chapter 116 of the General Statutes shall be subject to licensure under this section except as the institution or a particular activity of the institution may be exempt from licensure by one or another provision of this section.

(a) Definitions. — As used in this section the following terms are defined as set forth in this subsection:

(1) "Post-secondary degree". A credential conferring on the recipient thereof the title of "Associate", "Bachelor", "Master", or "Doctor", or an equivalent title, signifying educational attainment based on (i) study, (ii) a substitute for study in the form of equivalent experience or achievement testing, or (iii) a combination of the foregoing; provided, that "post-secondary degree" shall not include any honorary degree or other so-called "unearned" degree.

(2) "Institution". Any sole proprietorship, group, partnership, venture, society, company, corporation, school, college, or university that engages in, purports to engage in, or intends to engage in any type of post-secondary degree activity.

(3) "Post-secondary degree activity". Any of the following is "post-secondary degree activity":

(i) Awarding a post-secondary degree.

(ii) Conducting or offering study, experience, or testing for an individual or certifying prior successful completion by an individual of study, experience, or testing, under the representation that the individual successfully completing the study, experience, or testing will be awarded therefor, at least in part, a post-secondary degree.

(4) "Publicly registered name". The name of any sole proprietorship, group, partnership, venture, society, company, corporation, school, college, or institution that appears as the subject of any Articles of Incorporation, Articles of Amendment, or Certificate of Authority to Transact Business or to Conduct Affairs, properly filed with the Secretary of State of North Carolina and currently in force.

(5) "Board". The Board of Governors of The University of North Carolina.

(b) Required License. — No institution subject to this section shall undertake post-secondary degree activity in this State, whether through itself or through an agent, unless the institution is licensed as provided in this section to conduct post-secondary degree activity or is exempt from licensure under this section as hereinafter provided.

(c) Exemption from Licensure. — Any institution that has been continuously conducting post-secondary degree activity in this State under the same publicly registered name or series of publicly registered names since July 1, 1972, shall be exempt from the provisions for licensure under this section upon presentation to the Board of information acceptable to the Board to substantiate such post-secondary degree activity and public registration of the institution's names. Any institution that, pursuant to a predecessor statute to this subsection, had presented to the Board proof of activity and registration such that the Board granted exemption from licensure, shall continue to enjoy such exemption without further action by the Board.

(d) Exemption of Institutions Relative to Religious Education. — Notwithstanding any other provision of this section, no institution shall be subject to licensure under this section with respect to post-secondary degree activity based upon a program of study, equivalent experience, or achievement testing the institutionally planned objective of which is the attainment of a degree in theology, divinity, or religious education or in any other program of study, equivalent experience, or achievement testing that is designed by the institution primarily for career preparation in a religious vocation. This exemption shall be extended to any institution with respect to each program of study, equivalent experience, and achievement test that the institution demonstrates to the satisfaction of the Board should be exempt under this subsection.

(e) Post-secondary Degree Activity within the Military. — To the extent that an institution undertakes post-secondary degree activity on the premises of military posts or reservations located in this State for military personnel stationed on active duty there, or their dependents, the institution shall be exempt from the licensure requirements of this section.

(f) Standards for Licensure.— To receive a license to conduct post-secondary degree activity in this State, an institution shall satisfy the Board that the institution has met the following standards:

(1) That the institution is State-chartered. If chartered by a state or sovereignty other than North Carolina, the institution shall also obtain a Certificate of Authority to Transact Business or to Conduct Affairs in North Carolina issued by the Secretary of State of North Carolina;

(2) That the institution has been conducting post-secondary degree activity in a state or sovereignty other than North Carolina during consecutive, regular-term, academic semesters, exclusive of summer sessions, for at least the two years immediately prior to submitting an application for licensure under this section, or has been conducting with enrolled students, for a like period in this State or some other state or sovereignty, post-secondary educational activity not related to a post-secondary degree; provided, that an institution may be temporarily relieved of this standard under the conditions set forth in subsection (i), below;

(3) That the substance of each course or program of study, equivalent experience, or achievement test is such as may reasonably and adequately achieve the stated objective for which the study, experience, or test is offered or to be certified as successfully completed;

(4) That the institution has adequate space, equipment, instructional materials, and personnel available to it to provide education of good quality;

(5) That the education, experience, and other qualifications of directors, administrators, supervisors, and instructors are such as may reasonably insure that the students will receive, or will be reliably certified to have received, education consistent with the stated objectives of any course or program of study, equivalent experience, or achievement test offered by the institution;

(6) That the institution provides students and other interested persons with a catalog or brochure containing information describing the substance, objectives, and duration of the study, equivalent experience, and achievement testing offered, a schedule of related tuition, fees, and all other necessary charges and expenses, cancellation and refund policies, and such other material facts concerning the institution and the program or course of study, equivalent experience, and achievement testing as are reasonably likely to affect the decision of the student to enroll therein, together with any other disclosures that may be specified by the Board; and that such information is provided to prospective students prior to enrollment;

(7) That upon satisfactory completion of study, equivalent experience, or achievement test, the student is given appropriate educational credentials by the institution, indicating that the relevant study, equivalent experience, or achievement testing has been satisfactorily completed by the students;

(8) That records are maintained by the institution adequate to reflect the application of relevant performance or grading standards to each enrolled student;

(9) That the institution is maintained and operated in compliance with all pertinent ordinances and laws, including rules and regulations adopted pursuant thereto, relative to the safety and health of all persons upon the premises of the institution;

(10) That the institution is financially sound and capable of fulfilling its commitments to students;

(11) That the institution, through itself or those with whom it may contract, does not engage in promotion, sales, collection, credit, or other practices of any type which are false, deceptive, misleading, or unfair;

(12) That the chief executive officer, trustees, directors, owners, administrators, supervisors, staff, instructors, and employees of the institution have no record of unprofessional conduct or incompetence that would reasonably call into question the overall quality of the institution;

(13) That the student housing owned, maintained, or approved by the institution, if any, is appropriate, safe, and adequate;

(14) That the institution has a fair and equitable cancellation and refund policy; and

(15) That no person or agency with whom the institution contracts has a record of unprofessional conduct or incompetence that would reasonably call into question the overall quality of the institution.

(g) Review of Licensure. — Any institution that acquires licensure under this section shall be subject to review by the Board to determine that the institution continues to meet the standard for licensure of subsection (f), above. Review of such licensure by the Board shall always occur if the institution is legally reconstituted, or if ownership of a preponderance of all the assets of the institution changes pursuant to a single transaction or agreement or a recognizable sequence of transactions or agreements, or if two years has elapsed since licensure of the institution was granted by the Board.

Notwithstanding the foregoing paragraph, if an institution has continued to be licensed under this section and continuously conducted post-secondary degree activity in this State under the same publicly registered name or series of publicly registered names since July 1, 1979, or for six consecutive years, whichever is the shorter period, and is accredited by an accrediting commission recognized by the Council on Post-Secondary Accreditation, such institution shall be subject to licensure review by the Board every six years to determine that the institution continues to meet the standard for licensure of subsection (f), above. However, should such an institution cease to maintain the specified accreditation, become legally reconstituted, have ownership of a preponderance of all its assets transferred pursuant to a single transaction or agreement or a recognizable sequence of transactions or agreements to a person or organization not licensed under this section, or fail to meet the standard for licensure of subsection (f), above, then the institution shall be subject to licensure review by the Board every two years until a license to conduct post-secondary degree activity and the requisite accreditation have been restored for six consecutive years.

(h) Denial and Revocation of Licensure. — Any institution seeking licensure under the provisions of this section that fails to meet the licensure requirements of this section shall be denied a license to conduct post-secondary degree activity in this State. Any institution holding a license to conduct post-secondary degree activity in this State that is found by the Board of Governors not to satisfy the licensure requirements of this section shall have its license to conduct post-secondary degree activity in this State revoked by the Board; provided, that the Board of Governors may continue in force the license of an institution deemed by the Board to be making substantial and expeditious progress toward remedying its licensure deficiencies.

(i) Regulatory Authority in the Board. — The Board shall have authority to establish such rules, regulations, and procedures as it may deem necessary or appropriate to effect the provisions of this section. Such rules, regulations, and procedures may include provision for the granting of an interim permit to conduct post-secondary degree activity in this State to an institution seeking licensure but lacking the two-year period of activity prescribed by subsection (f)(2), above.

(j) Enforcement Authority in the Attorney General. — The Board shall call to the attention of the Attorney General, for such action as he may deem appropriate, any institution failing to comply with the requirements of this section.

(k) Severability. — The provisions of this section are severable, and, if any provision of this section is declared unconstitutional or invalid by the courts, such declaration shall not affect the validity of the section as a whole or any provision other than the provision so declared to be unconstitutional or invalid. (1971, c. 1244, s. 1; 1973, c. 1331, s. 3; 1975, c. 268; 1977, c. 563, ss. 1-4; 1979, c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1; 1983 (Reg. Sess., 1984), c. 1006.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, rewrote this section.

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

§ 116-22. Definitions applicable to §§ 116-19 to 116-22.

As used in G.S. 116-19 through 116-22:

(2) "Student" shall mean a resident of North Carolina in accordance with definitions of residency that may from time to time be adopted by the Board of Governors of the University of North Carolina and published in the residency manual of said Board; and a person who has not

received a bachelor's degree, or qualified therefor, and who is otherwise classified as an undergraduate under such regulations as the Board of Governors of the University of North Carolina may promulgate. The enrollment figures required by G.S. 116-19 through 116-22 shall be the number of full-time equivalent students as computed under regulations prescribed by the Board of Governors of the University of North Carolina. Qualification for in-State tuition under G.S. 116-143.3 makes a person a "student" as defined in this subdivision. (1971, c. 744, s. 4; c. 1244, s. 5; 1983 (Reg. Sess., 1984), c. 1034, s. 59.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the last sentence of subdivision (2).

Part 3. Constituent Institutions.

§ 116-31. Membership of the boards of trustees.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 50(d), provides: "Notwithstanding the provisions of G.S. 116-31, the Board of Trustees of the North Carolina School of Science and Mathematics shall be as provided in G.S. 115C-223 as amended by this section [s. 50 of c. 1034]." Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 116-36.4. Vending facilities.

The Board of Governors shall, not later than October 1 of each year, make an itemized annual report in a format to be determined by the Office of State Budget and Management to the Joint Legislative Commission on Governmental Operations concerning the receipts, expenditures, and use of net proceeds from operations of vending facilities for the previous fiscal year under G.S. 116-36.1 through G.S. 116-36.3. A similar quarterly report shall be made within 60 days after the end of each quarter. Net proceeds may be used only as authorized by the Board of Governors, but this section does not authorize expenditures for purposes not otherwise authorized by law. (1983 (Reg. Sess., 1984), c. 1034, s. 172.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 175, makes this section effective Oct. 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Article 3.

Community Colleges.

§ 116-53. Appropriations by State.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 36, provides, inter alia:

"Notwithstanding the matching requirements in G.S. 116-53(b) and G.S. 115D-31, the matching requirements for the institutions receiving capital appropriations in this paragraph shall be as follows:

"(1) No institution shall be required to match

State appropriations for capital projects until the funds expended for capital projects from State appropriations (excluding vocational education funds) equal expenditures from local funds;

"(2) Funds appropriated to Isothermal Community College for the Polk County satellite and to Central Carolina Technical Institute for a classroom, lab, and shop building shall be matched dollar for dollar with cash expenditures; and

"(3) Funds appropriated to house a regional program at Southwestern Technical College shall not require a local match.

"Also, the sum of one hundred thousand dollars ($100,000) shall be allocated by the State Board of Community Colleges to fund feasibility studies for proposed new capital projects.

"The sum of three million five hundred thirty thousand dollars ($3,530,000) allocated to Southwestern Technical College in this section shall be used to construct a Regional Allied Health and Geriatrics Training Center. The Center will serve a regional, multi-county area in Western North Carolina; therefore, this allocation is exempt from matching requirements in accordance with G.S. 116-53(b) and G.S. 115D-31. A committee consisting of the Chancellor of Western Carolina University, the Presidents of Southwestern Technical College, Haywood Technical College, and Tri-County Community College, or their designees, and two faculty members of Western Carolina University shall coordinate the services offered by the Center to avoid overlapping and duplicative efforts involving allied health and geriatrics training by these four institutions."

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 110.1, provides:

"Notwithstanding the matching requirements in Section 36 of Chapter 1034 of the 1983 Session Laws, Tri-County Community College shall not be required to provide matching funds for capital appropriations as allocated to the Tri-County Community College in Section 36 of Chapter 1034 of the 1983 Session Laws."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

Article 14.

General Provisions as to Tuition and Fees in Certain State Institutions.

§ 116-143.3. Tuition of personnel in the armed services.

(a) For purposes of this section the term "armed services" shall mean the United States Air Force, Army, Coast Guard, Marine Corps, and Navy; the North Carolina National Guard; and any Reserve Component of the foregoing. The term "abode" shall mean the place where a person actually lives, whether temporarily or permanently; the term "abide" shall mean to live in a given place.

(b) Any member of the armed services, upon qualification for admission to an institution of higher education as defined in G.S. 116-143.1(a)(3), shall be eligible to be charged the in-State tuition rate at that institution while abiding in this State incident to active military duty.

(c) Any dependent relative of a member of the armed services as defined by the Board of Governors of The University of North Carolina and by the North Carolina Board of Community Colleges while sharing the abode of that member shall be accorded the benefit available to that member pursuant to subsection (b) above, if the dependent relative qualifies for admission to an institution of higher education as defined in G.S. 116-143.1(a)(3). In the event the member of the armed services removes his abode from North Carolina during an academic year, the dependent relative shall continue to be eligible for the in-State tuition rate during the remainder of that academic year.

(d) The burden of proving entitlement to the benefit of this section shall lie with the applicant therefor.

(e) A person receiving the in-State tuition benefit solely by reason of this section shall not, during the period of receiving that benefit, qualify for or be the basis of conferring the benefits of G.S. 116-143.1(g), (h), (i), (j), (k), or (*l*). (1983 (Reg. Sess., 1984), c. 1034, s. 57.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

ARTICLE 18.

Scholarship Loan Fund for Prospective Teachers.

§§ 116-171 to 116-174: Transferred to §§ 115C-468 to 115C-471 by Session Laws 1983 (Regular Session 1984), c. 1034, s. 10.1, effective July 1, 1984.

Chapter 118.

Firemen's Relief Fund.

Article 4.

North Carolina Firemen's and Rescue Squad Workers' Pension Fund.

Sec.
118-36. Director.

Article 1.

Fund Derived from Fire Insurance Companies.

§ 118-1. Fire insurance companies to report premiums collected.

Local Supplemental Firemen's Retirement Fund. —
Gastonia: 1983 (Reg. Sess., 1984), c. 1016.

Article 4.

North Carolina Firemen's and Rescue Squad Workers' Pension Fund.

§ 118-36. Director.

There is created an office to be known as Director of the North Carolina Firemen's and Rescue Squad Workers' Pension Fund. He shall be named by the board and shall serve at its pleasure. The director shall be subject to the provisions of the State Personnel Act. The director shall promptly transmit to the State Treasurer all moneys collected by him, which moneys shall be deposited by the State Treasurer into the fund. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1969, c. 359; 1981, c. 1029, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 113.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted "shall be bonded in such amount as may be determined by the board, and he" following "director" at the beginning of the last sentence.

Chapter 120.

General Assembly.

Article 1.

Apportionment of Members; Compensation and Allowances.

Sec.
120-1. Senators.
120-2. House apportionment specified.
120-3. (Effective upon the convening of the 1985 Regular Session) Pay of members and officers of the General Assembly.
120-3.1. (Effective until the convening of the 1985 Regular Session) Subsistence and travel allowances for members of the General Assembly.
120-3.1. (Effective upon the convening of the 1985 Regular Session) Subsistence and travel allowances for members of the General Assembly.

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Legislative Retirement System.

120-4.8. Definitions.
120-4.11. Membership.
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120-4.21. (Effective upon the convening of the 1985 Regular Session) Service retirement benefits.
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120-4.25. (Effective upon the convening of the 1985 Regular Session) Return of accumulated contributions.
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Article 6B.

Legislative Research Commission.

120-30.11. Time of appointments; terms of office.

Article 7.

Legislative Services Commission.

120-32. Commission duties.
120-32.01. Information to be supplied.
120-34. Printing of session laws.

Article 7A.

Fiscal Research Division.

120-36.4. [Repealed.]
120-36.6. Legislative Fiscal Research staff participation.

Article 8.

Elected Officers.

120-37. Elected officers; salaries; staff.

Article 16.

Legislative Appointments to Boards and Commissions.

120-123. Service by members of the General Assembly on certain boards and commissions.

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120-129. Definitions.
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120-132. Testimony by legislative employees.
120-134. Penalty.
120-135 to 120-139. [Reserved.]

Article 18.

Review of Proposals to License New Occupations and Professions.

120-140. Findings and purpose.
120-141. Definitions.
120-142. Assessment of proposed occupational and professional licensing boards.
120-143. Procedure and criteria to be used in preparation of assessment reports.
120-144. Hearings by Legislative Committee on New Occupational and Professional Licensing Boards; final action by Committee.
120-145. Legislative Committee on New Occupational and Professional Licensing Boards.

Article 1.

Apportionment of Members; Compensation and Allowances.

§ 120-1. Senators.

(a) For the purpose of nominating and electing members of the Senate in 1984 and every two years thereafter, senatorial districts are established and seats in the Senate are apportioned among those districts as follows:

District 1 elects one Senator and consists of Camden, Chowan, Currituck, Dare, Hyde, Pasquotank, Perquimans, Tyrrell and Washington Counties; the Pantego Township of Beaufort County; the following areas in Bertie County: Merry Hill, and Whites Townships, and in Windsor Township the Town of Askewville and Enumeration Districts 196 and 197; and in Gates County: Holly Grove, Hunters Hill and Mintonsville Townships.

District 2 elects one Senator and consists of Hertford and Northampton Counties; the following areas in Bertie County: Colerain, Indian Woods, Mitchells, Roxobel, Snake Bite and Woodville Townships, and in Windsor Township: The Town of Windsor and Enumeration Districts 198A, and 199; in Edgecombe County: 3 (Upper Conetoe) and 4 (Deep Creek) Townships; in Gates County: Gatesville, Hall, Haslett and Reynoldson Townships; in Halifax County: Conoconnara, Enfield, Halifax, Littleton, Palmyra, Roseneath, Scotland Neck, and Weldon Townships; in Martin County: Goose Nest and Hamilton Townships; in Vance County: Middleburg-Nutbush, Townsville and Williamsboro Townships; and in Warren County: Fork, Hawtree, Nutbush, River, Roanoke, Sandy Creek, Shocco, Sixpound, Smith Creek and Warrenton Townships.

District 3 elects one Senator and consists of Carteret, Craven and Pamlico Counties.

District 4 elects one Senator and consists of Onslow County.

District 5 elects one Senator and consists of Duplin, Jones and Lenoir Counties and Columbia and Union Townships in Pender County.

District 6 elects one Senator and consists of in Edgecombe County: 1 (Tarboro), 2 (Lower Conetoe), 5 (Lower Fishing Creek), 8 (Sparta), 9 (Otter Creek), 10 (Lower Town Creek), 11 (Walnut Creek), 12 (Rocky Mount), 13 (Cokey), and 14 (Upper Town Creek) Townships; in Martin County: the Robersonville Township; in Pitt County: Arthur, Belvoir, Bethel, Falkland, Farmville and Fountain Townships; and in Wilson County: Gardner, Wilson and Toisnot Townships.

District 7 elects one Senator and consists of New Hanover County and the following townships of Pender County: Burgaw, Canetuck, Caswell, Grady, Holly, Long Creek, Rocky Point and Topsail.

District 8 elects one Senator and consists of Greene and Wayne Counties.

District 9 elects one Senator and consists of in Beaufort County: Bath, Chocowinity, Long Acre, Richland and Washington Townships; in Martin County: Beargrass, Cross Roads, Griffins, Jamesville, Poplar Point, Williams and Williamston Townships; and in Pitt County: Ayden, Carolina, Chicod, Greenville, Grifton, Grimesland, Pactolus, Swift Creek and Winterville Townships.

District 10 elects one Senator and consists of Nash County; in Edgecombe County: 6 (Upper Fishing Creek) and 7 (Swift Creek); in Halifax County: Brinkleyville, Butterwood, Faucett and Roanoke Rapids Townships; in Warren County: Fishing Creek and Judkins Townships; and in Wilson County: Black Creek, Cross Roads, Old Fields, Saratoga, Springhill, Stantonsburg, and Taylor Townships.

District 11 elects one Senator and consists of Franklin and Vance Counties; and in Wake County: Bartons Creek, Little River, Marks Creek, New Light and Wake Forest Townships and St. Matthews Precincts 1, 2, 3 and 4.

District 12 elects two Senators and consists of the following townships of Cumberland County: Black River, Carvers Creek, Cedar Creek, Cross Creek, Eastover, Gray's Creek, Manchester, Pearces Mill, Rockfish and Seventy-First.

District 13 elects two Senators and consists of Durham, Granville and Person Counties and the following townships of Orange County: Cedar Grove, Eno and Little River.

District 14 elects three Senators and consists of Harnett and Lee Counties and the following areas in Wake County: Buckhorn, Cary, Cedar Fork, Holly Springs, House Creek, Leesville, Meredith, Middle Creek, Neuse River, Panther Branch, Raleigh, St. Mary's, Swift Creek and White Oak Townships and those portions of St. Matthews Township not included in District 11.

District 15 elects one Senator and consists of Johnston and Sampson Counties.

District 16 elects two Senators and consists of Chatham, Moore and Randolph Counties and the following townships of Orange County: Bingham, Chapel Hill, Cheeks and Hillsborough.

District 17 elects two Senators and consists of Anson, Montgomery, Richmond, Scotland, Stanly and Union Counties.

District 18 elects one Senator and consists of Bladen, Brunswick and Columbus Counties and the Beaver Dam Township of Cumberland County.

District 19 elects one Senator and consists of the following townships of Forsyth County: Belews Creek and Kernersville; and consists of the following townships and precincts of Guilford County: Bruce Township, Center Grove Township, Clay Township, Fentress Township, Friendship Precinct I, Greene Township, Madison Township, Monroe Township, Greensboro Precincts 10, 20, 21, 27, 28, 32, 34, and 35, and Oak Ridge Township, Rock Creek Township, and Washington Township.

District 20 elects two Senators and consists of the following townships of Forsyth County: Abbotts Creek, Bethania, Broadbay, Clemmonsville, Lewisville, Middle Fork, Old Richmond, Old Town, Salem Chapel, South Fork, Vienna and Winston Townships.

District 21 elects one Senator and consists of Alamance and Caswell Counties.

District 22 elects one Senator and consists of Cabarrus County and the following precincts of Mecklenburg County: Charlotte Precincts 62 and 64, Clear Creek Precinct, Matthews Precinct, Mint Hill Precincts 1 and 2, Morning Star Precinct, and Providence Precinct.

District 23 elects two Senators and consists of Davidson, Davie and Rowan Counties.

District 24 elects two Senators and consists of Alleghany, Ashe, Rockingham, Stokes, Surry and Watauga Counties.

District 25 elects three Senators and consists of Cleveland, Gaston, Lincoln and Rutherford Counties.

District 26 elects two Senators and consists of Alexander, Catawba, Iredell and Yadkin Counties.

District 27 elects two Senators and consists of Avery, Burke, Caldwell, Mitchell and Wilkes Counties.

District 28 elects two Senators and consists of Buncombe, McDowell, Madison and Yancey Counties.

District 29 elects two Senators and consists of Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Polk, Swain and Transylvania Counties.

District 30 elects one Senator and consists of Hoke and Robeson Counties.

District 31 elects one Senator and consists of the following townships and precincts of Guilford County: Jefferson Township, Greensboro Precincts 3, 4, 5, 6, 7, 8, 9, 11, 19, 25, 29, and 30, High Point Precincts 3, 5, 6, 7, 11, 12, and 19, Jamestown Precincts 1, 2, and 3, Sumner Township, and Block 921 of Census Tract 166 in High Point Township.

District 32 elects one Senator and consists of the following townships and precincts in Guilford County: Deep River Township, Friendship Precinct II, Greensboro Precincts 1, 2, 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, 33 and 36, and High Point Precincts 1, 2, 4, 8, 9, 10, 13, 14, 15, 16, 17, 18, 20, and 21, but it does not include Block 921 of Census Tract 166 in High Point Township.

District 33 elects one Senator and consists of the following precincts of Mecklenburg County: Charlotte Precincts 2, 11, 12, 13, 14, 15, 16, 22, 25, 27, 29, 31, 39, 41, 42, 44, 46, 52, 54, 55, 56, 60, 77, 78, and 82, and Long Creek Precinct 2.

District 34 elects one Senator and consists of the following precincts of Mecklenburg County: Charlotte Precincts 3, 4, 5, 23, 24, 26, 28, 30, 33, 40, 43, 45, 53, 61, 79, 80, 81, 83, 84, and 89, and Berryhill Precinct, Cornelius Precinct, Crab Orchard Precincts 1 and 2, Davidson Precinct, Huntersville Precinct, Lemly Precinct, Long Creek Precinct 1, Mallard Creek Precincts 1 and 2, Oakdell Precinct, Paw Creek Precincts 1 and 2, and Steel Creek Precincts 1 and 2.

District 35 elects one Senator and consists of the following precincts of Mecklenburg County: Charlotte Precincts 1, 6, 7, 8, 9, 10, 17, 18, 19, 20, 21, 32, 34, 35, 36, 37, 38, 47, 48, 49, 50, 51, 57, 58, 59, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 85, 86, and 88, and Pineville Precinct.

(b) The names and boundaries of townships, towns and enumeration districts specified in this section are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. census.

(c) For Guilford County, precinct boundaries are shown on the maps on file with the State Board of Elections on January 1, 1982, in accordance with G.S. 163-128(b).

For Mecklenburg County, precinct boundaries are as shown on the current maps in use on January 31, 1984, by the Mecklenburg County Board of Elections under G.S. 163-128(b).

If any changes in precinct boundaries are made, the areas on the maps shall still remain in the same Senate District.

The Wake County precinct boundaries are as shown on the current map in use by the Wake County Board of Elections on January 31, 1984, in accordance with G.S. 163-128(b). If changes in precinct boundaries are made, the areas on the map shall still remain in the same Senate District. (Code, s. 2844; Rev., s. 4398; 1911, c. 150; C.S., s. 6087; 1921, c. 161; 1941, c. 225; 1963, Ex. Sess., c. 1; 1966, Ex. Sess., c. 1, s. 1; 1971, c. 1177; 1981, c. 821; 1982, Ex. Sess., c. 5; 1982, 2nd Ex. Sess., c. 2; 1984, Ex. Sess., c. 4, ss. 1-3; c. 5, ss. 1-4.)

Editor's Note. — Session Laws 1984, Ex. Sess., c. 4, s. 3.1, provides: "In the event that the U.S. Supreme Court reverses the opinion of the U.S. District Court which held the composition of Senate District 22 to violate the Voting Rights Act, then Sections 1 through 3 of this act are repealed and the prior law as to Senate District 22 is revived as to any future election."

Session Laws 1984, Ex. Sess., c. 5, s. 4.1 provides: "In the event that the U.S. Supreme Court reverses the opinion of the U.S. District Court which held the composition of Senate District 2 to violate the Voting Rights Act, then Sections 1 through 4 of this act are repealed and the prior law as to Senate Districts 1, 2, 6, 9, 10, 11 and 14 is revived as to any future election."

Effect of Amendments. —

The 1984, Ex. Sess., amendment by c. 4, effective March 8, 1984, in subsection (a) substituted "1984" for "1982" in the introductory language, rewrote the paragraph relating to District 22, and inserted the paragraphs relating to Districts 33, 34 and 35, and in subsection (c) added the second and third paragraphs.

The 1984, Ex. Sess., amendment by c. 5, effec-

tive March 8, 1984, in subsection (a) substituted "1984" for "1982" in the introductory paragraph and rewrote the paragraphs relating to Districts 1, 2, 6, 9, 10, 11 and 14, rewrote subsection (b), and added the last paragraph of subsection (c).

§ 120-2. House apportionment specified.

(a) For the purpose of nominating and electing members of the North Carolina House of Representatives in 1984 and periodically thereafter, the State of North Carolina shall be divided into the following districts:

District 1 shall elect two Representatives and shall consist of Camden, Chowan, Currituck, Dare, Pasquotank, Perquimans, and Tyrrell Counties; Holly Grove Township of Gates County; and Lees Mills, Plymouth, and Skinnersville Townships of Washington County.

District 2 shall elect one Representative and shall consist of Beaufort and Hyde Counties; and Scuppernong Township of Washington County.

District 3 shall elect three Representatives and shall consist of Craven, Lenoir, and Pamlico Counties.

District 4 shall elect three Representatives and shall consist of Carteret and Onslow Counties.

District 5 shall elect one Representative and shall consist of Northampton County; Indian Woods, Roxobel, Snake Bite, and Woodville Townships of Bertie County; Gatesville, Hall, Haslett, Hunters Mill, Mintonsville, and Reynoldson Townships of Gates County; and Harrellsville, Maneys Neck, Murfreesboro, St. Johns, and Winton Townships of Hertford County.

District 6 shall elect one Representative and shall consist of Colerain, Merry Hill, Mitchells, Whites, and Windsor Townships of Bertie County; Ahoskie Township of Hertford County; Beargrass, Cross Roads, Giffins, Jamesville, Poplar Point, Williams, and Williamston Townships of Martin County; and Bethel and Carolina Townships of Pitt County.

District 7 shall elect one Representative and shall consist of Brinkleyville, Butterwood, Conoconnara, Enfield, Faucett, Halifax, Palmyra, Roseneath, Scotland Neck, and Weldon Townships of Halifax County; Goose Nest, Hamilton, and Robersonville Townships of Martin County; and Fishing Creek, Fork, Sandy Creek, Shocco, and Warrenton Townships of Warren County.

District 8 shall elect three Representatives and shall consist of the remainders of Edgecombe, Nash, and Wilson Counties that are not included in District 70.

District 9 shall elect two Representatives and shall consist of Greene County; and Arthur, Ayden, Belvoir, Chicod, Falkland, Farmville, Fountain, Greenville, Grifton, Grimesland, Pactolus, Swift Creek, and Winterville Townships of Pitt County.

District 10 shall elect one Representative and shall consist of Duplin and Jones Counties.

District 11 shall elect two Representatives and shall consist of Wayne County.

District 12 shall elect two Representatives and shall consist of Bladen and Sampson Counties; and Burgaw, Caswell, Columbia, Holly, Canetuck, Grady, Long Creek, Rocky Point, and Union Townships of Pender County.

District 13 shall elect two Representatives and shall consist of Federal Point, Harnett, Masonboro, and Wilmington Townships of New Hanover County.

District 14 shall elect one Representative and shall consist of Brunswick County; Cape Fear Township of New Hanover County; and Topsail Township of Pender County.

District 15 shall elect one Representative and shall consist of Columbus County.

District 16 shall elect three Representatives and shall consist of Hoke and Robeson Counties; and Spring Hill, Stewartsville, and Wiliamsons Townships of Scotland County.

District 17 shall elect two Representatives and shall consist of Block 901 and Enumeration District 534 of Census Tract 34 in Manchester Township, Block 901 and Enumeration District 535 of Census Tract 34 in Seventy-First Township, Block 901 of Census Tract 34 in Carver's Creek Township, Cross Creek Precincts 1, 3, 5, 9, 13, 16, 17, and 19, Spring Lake Precinct, Morganton Road 1 Precinct, Beaver Lake Precinct, Westarea Precinct, and that part of Census Tract 33.02 in Precinct Seventy-First 1. Any part of Cross Creek Township which may be entirely surrounded by Morganton Road 1 Precinct shall also be in the District. Block 304 of Census Tract 26 of Cross Creek Township is not in the District.

District 18 shall elect three Representatives and shall consist of the remainder of Cumberland County not included in District 17.

District 19 shall elect two Representatives and shall consist of Harnett and Lee Counties.

District 20 shall elect two Representatives and shall consist of Franklin and Johnston Counties.

District 21 shall elect one Representative and shall consist of the following precincts of Wake County: Raleigh 14, 19, 20, 22, 25, 26, 28, 34, 35, 38, 40, and St. Matthews 3.

District 22 shall elect three Representatives and shall consist of Caswell, Granville, Person, and Vance Counties; Littleton and Roanoke Rapids Townships of Halifax County; and Hawtree, Judkins, Nutbush, River, Roanoke, Sixpound, and Smith Creek Townships of Warren County.

District 23 shall elect one Representative and shall consist of Durham County Precincts 6, 10, 11, 12, 13, 14, 15, 18, 34, 36, 40, 41, 42, and 47. It also includes all of Durham County Precinct 19 not included in District 68.

It also includes from Precinct 9 only the following: Block 303 of Census Tract 13.02, Blocks 411 and 412 of Census Tract 20.03, and the part of Block 113 of Census Tract 20.02 excluding the area bounded by Bexley Avenue, Monticello Avenue, Stuart Drive and Hope Valley Rd.

It also includes from Precinct 39 only the following: Blocks 202, 216, 217, 415, 416, 417, 418 and 419 of Census Tract 20.02.

District 24 shall elect two Representatives and shall consist of Orange County; and Baldwin, Cape Fear, Center, Hadley, Haw River, Hickory Mountain, Matthews, New Hope, Oakland, and Williams Townships of Chatham County.

District 25 shall elect four Representatives and shall consist of Alamance and Rockingham Counties; and Beaver Island and Snow Creek Townships of Stokes County.

District 26 shall elect one Representative and shall consist of Providence Township of Randolph County and Greensboro Precincts 5, 6, 7, 8, 19, 29, and 30, and Fentress Township of Guilford County.

District 27 shall elect three Representatives and shall consist of South Center Grove Precinct, Jamestown Precinct 2, North Madison Precinct, South Monroe Precinct, North Sumner Precinct, and Greensboro Precincts 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36 of Guilford County.

District 28 shall elect two Representatives and shall consist of Deep River Township, Friendship Township, High Point Township, Jamestown Precincts 1 and 3, and South Sumner Precinct of Guilford County.

District 29 shall elect one Representative and shall consist of Belews Creek and Salem Chapel Townships of Forsyth County and North Center Grove Precinct, South Madison Precinct, North Monroe Precinct and Bruce, Clay,

Greene, Jefferson, Oak Ridge, Rock Creek and Washington Townships of Guilford County.

District 30 shall elect one Representative and shall consist of Albright, Bear Creek, and Gulf Townships of Chatham County; and Asheboro, Coleridge, Columbia, Franklinville, Liberty, and Randleman Townships of Randolph County.

District 31 shall elect one Representative and shall consist of Moore County.

District 32 shall elect one Representative and shall consist of Richmond County; and Laurel Hill Township of Scotland County.

District 33 shall elect one Representative and shall consist of Anson and Montgomery Counties.

District 34 shall elect four Representatives and shall consist of Cabarrus, Stanly, and Union Counties.

District 35 shall elect two Representatives and shall consist of Rowan County.

District 36 shall elect one Representative and shall consist of the following precincts of Mecklenburg County: Charlotte Precincts 6, 34, 62, 63, 83, 84, and 85, Clear Creek Precinct, Crab Orchard Precinct 1, Matthews Precinct, Mint Hill Precincts 1 and 2, and Morning Star Precinct.

District 37 shall elect three Representatives and shall consist of Davidson and Davie Counties; and Eagle Mills and Union Grove Townships of Iredell County.

District 38 shall elect one Representative and shall consist of Back Creek, Brower, Cedar Grove, Concord, Grant, Level Cross, New Hope, New Market, Pleasant Grove, Richland, Tabernacle, Trinity, and Union Townships of Randolph County.

District 39 shall elect three Representatives and shall consist of the remainder of Forsyth County not included in Districts 29, 66, or 67.

District 40 shall elect three Representatives and shall consist of Alleghany, Ashe, and Surry Counties; Big Creek, Danbury, Meadows, Peters Creek, Quaker Gap, Sauratown, and Yadkin Townships of Stokes County; and Bald Mountain, Blowing Rock, Blue Ridge, Boone, Brushy Fork, Cove Creek, Elk, Meat Camp, New River, North Fork, Stony Fork, and Watauga Townships of Watauga County.

District 41 shall elect two Representatives and shall consist of Wilkes and Yadkin Counties; and Gwaltneys, Sharpes, and Sugar Loaf Townships of Alexander County.

District 42 shall elect one Representative and shall consist of Bethany, Chambersburg, Concord, Cool Spring, New Hope, Olin, Sharpesburg, Statesville, and Turnersburg Townships of Iredell County.

District 43 shall elect one Representative and shall consist of Millers Township of Alexander County; Caldwell, Catawba, and Mountain Creek Townships of Catawba County; and Barringer, Coddle Creek, Davidson, Fallstown, and Shiloh Townships of Iredell County.

District 44 shall elect four Representatives and shall consist of Gaston and Lincoln Counties.

District 45 shall elect two Representatives and shall consist of Lower Fork and Upper Fork Townships of Burke County; and Bandy's, Clines, Hickory, Jacobs Fork, and Newton Townships of Catawba County.

District 46 shall elect three Representatives and shall consist of Avery, Caldwell, and Mitchell Counties; Ellendale, Little River, Taylorsville, and Wittenberg Townships of Alexander County; Drexel, Icard, Jonas Ridge, Lower Creek, Smoky Creek, and Upper Creek Townships of Burke County; and Beaverdam, Laurel Creek, and Shawneehaw Townships of Watauga County.

District 47 shall elect one Representative and shall consist of Linville, Lovelady, Morganton, Quaker Meadow, and Silver Creek Townships of Burke County.

District 48 shall elect three Representatives and shall consist of Cleveland, Polk, and Rutherford Counties.

District 49 shall elect one Representative and shall consist of McDowell and Yancey Counties.

District 50 shall elect one Representative and shall consist of Blue Ridge, Clear Creek, Edneyville, Green River, Hendersonville, and Mills River Townships of Henderson County.

District 51 shall elect four Representatives and shall consist of Buncombe and Transylvania Counties; and Crab Creek and Hoopers Creek Townships of Henderson County.

District 52 shall elect two Representatives and shall consist of Haywood, Jackson, Madison, and Swain Counties; and Stecoah and Yellow Creek Townships of Graham County.

District 53 shall elect one Representative and shall consist of Cherokee, Clay, and Macon Counties; and Cheoah Township of Graham County.

District 54 shall elect one Representative and shall consist of the following precincts of Mecklenburg County: Charlotte Precincts 5, 28, 29, 43, 44, and 60, Cornelius Precinct, Crab Orchard Precinct 2, Davidson Precinct, Huntersville Precinct, Lemly Precinct, and Mallard Creek Precincts 1 and 2.

District 55 shall elect one Representative and shall consist of the following precincts of Mecklenburg County: Charlotte Precincts 8, 9, 10, 19, 32, 48, 50, 57, 58, 59, 74, 75, 76, and 77, Pineville Precinct, and Steel Creek Precinct 2.

District 56 shall elect one Representative and shall consist of the following precincts of Mecklenburg County: Charlotte Precincts 20, 21, 37, 38, 49, 51, 52, 78, 79, and 80, Berryhill Precinct, Long Creek Precinct 1, Oakdell Precinct, Paw Creek Precincts 1 and 2, and Steel Creek Precinct 1.

District 57 shall elect one Representative and shall consist of the following precincts of Mecklenburg County: Charlotte Precincts 35, 36, 47, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 86, and 88, and Providence Precinct.

District 58 shall elect one Representative and shall consist of Charlotte Precincts 1, 2, 3, 4, 7, 13, 14, 15, 17, 18, 33, 45, 46, and 61 of Mecklenburg County.

District 59 shall elect one Representative and shall consist of the following precincts of Mecklenburg County: Charlotte Precincts 11, 16, 22, 23, 27, 31, 39, 41, 53, 81, and 89, and Long Creek Precinct 2, and from Precinct 42 it shall include only Blocks 104 and 105 of Census Tract 53.02.

District 60 shall elect one Representative and shall consist of Charlotte Precincts 12, 24, 25, 26, 30, 40, 54, 55, 56, and 82 of Mecklenburg County, and shall include all of Precinct 42 in Mecklenburg County except for Blocks 104 and 105 of Census Tract 53.02.

District 61 shall elect one Representative and shall consist of Barton's Creek Township and New Light Township of Wake County and the following precincts of Wake County: Raleigh 3, 4, 5, 10, 11, 12, 13, 15, 17, 18, 30, 33, 36, 37, 39, House Creek 4, and Leesville.

District 62 shall elect one Representative and shall consist of Buckhorn Township, Holly Springs Township, Middle Creek Township, Panther Branch Township, and White Oak Township of Wake County and the following precincts of Wake County: Cary 1, 4, and 7, St. Mary's 1 and 2, and St. Matthews 2 and 4, except that in St. Mary's 2, it does not include Blocks 112, 951 and 952 (outside Garner city limits) of Census Tract 528.05 of St. Mary's Township.

District 63 shall elect one Representative and shall consist of Cedar Fork Township of Wake County and the following precincts of Wake County: Cary 2, 3, and 5, House Creek 1, 2, and 3, Meredith and Raleigh 16, 29, 31, 32, and 41.

District 64 shall elect one Representative and shall consist of the following precincts of Wake County: Cary 6, Raleigh 1, 2, 6, 7, 8, 9, 21, 23, 24, 27, St.

Mary's 3, 4, 5, and 6, and Swift Creek 1 and 2. It also includes from St. Mary's 2 Blocks 112, 951, and 952 (outside Garner city limits) of Census Tract 528.05 of St. Mary's Township.

District 65 shall elect one Representative and shall consist of Little River Township, Mark's Creek Township and Wake Forest Township of Wake County and the following precincts of Wake County: Raleigh 42, 43, 44, and 45, Neuse, and St. Matthews 1.

District 66 shall elect one Representative and shall consist of the following precincts of Forsyth County: 30-1, 40-1, 40-2, 40-3, 40-4, 40-5, 40-6, 50-1, 50-2, 50-3, 50-4, 50-5, 6-3, 8-2, and 8-3 but does not include that part of Block 314, Census Tract 33.03 of Winston Township which is not contiguous with the primary corporate limits of the City of Winston-Salem.

District 67 shall elect one Representative and shall consist of the following precincts of Forsyth County: 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 30-2, 30-3, 30-5, 30-6, 90-2, 90-3, 90-5, and 10-3.

District 68 shall elect one Representative and shall consist of Durham County Precincts 1, 2, 3, 7, 8, 17, 20, 21, 22, 23, 24, 29, and 46.

It also includes all of Precinct 9 not included in District 23. It also includes all of Precinct 4 not included in District 69.

It also includes from Precinct 19 only the following: Blocks 115, 116, 118, 119, 120, 124, 201, 202, 203, 214, 307, 308, 316 and 317 of Census Tract 2.

District 69 shall elect one Representative and shall consist of Durham County Precincts 5, 25, 26, 28, 30, 31, 32, 33, 35, 37, 38, 43, 44, and 45. It also includes from Precinct 4 only the following: Block 316 of Census Tract 4.02 and Blocks 120, 123, 124, 125, 126, 127, 311 and 317 of Census Tract 4.01.

It also includes all of Precinct 39 not included in District 23.

District 70 shall elect one Representative and shall consist of the following:

(1) In Edgecombe County: Enumeration District 1154 of Census Tract 207 in Township 6 (Upper Fishing Creek); Census Tract 205 in Township 7 (Swift Creek); Enumeration Districts 1155, 1156, 1160, 1161, and 1162 of Census Tract 206 in Township 7 (Swift Creek); Census Blocks 101 through 106 and 121 through 128 in Census Tract 201 in the City of Rocky Mount in Township 12 (Rocky Mount); Census Blocks 112 through 139, Census Blocks 202 and 205 through 226, Census Block Group 3, and Census Block Group 4 of Census Tract 202 in the City of Rocky Mount in Township 12 (Rocky Mount); Census Block Group 1, Census Blocks 201 through 210 and 216 through 228, Census Blocks 301 through 318, 334, and 335, and Census Block Group 4 of Census Tract 204 in the City of Rocky Mount in Township 12 (Rocky Mount); Census Tracts 202, 203, 204, and 214 in Township 12 (Rocky Mount); Enumeration Districts 1191 and 1193 of Census Tract 213 in Township 12 (Rocky Mount); and Enumeration Districts 1223 and 1224 of Census Tract 202 and Enumeration Districts 1226A and 1226B of Census Tract 214 in Township 14 (Upper Town Creek).

(2) In Nash County: Census Tract 107 in North Whitakers Township; Census Block Groups 1, 2, and 3 and Census Blocks 403, 429, and 430 of Census Tract 102 in the City of Rocky Mount in Rocky Mount Township; and Census Tracts 106 and 107 in South Whitakers Township.

(3) In Wilson County: Enumeration District 743 of Census Tract 7 in Gardner Township; Enumeration Districts 700, 701, 702, 703A, and 703B of Census Tract 13 in Toisnot Township; Census Tract 2, Enumeration District 736A and Census Blocks 422, 423, and 424 of Census Tract 4, and Census Tracts 7, 8.01, and 8.02 in Wilson Township.

(b) The names and boundaries of townships specified in this section are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census.

(c) For Guilford and Cumberland Counties, precinct boundaries are as shown on the maps on file with the State Board of Elections on January 1, 1982, in accordance with G.S. 163-128(b).

For Mecklenburg, Wake, Durham, and Forsyth Counties, precinct boundaries and streets are as shown on the current maps in use by the appropriate county board of elections of January 31, 1984, in accordance with G.S. 163-128(b).

If any changes in precinct boundaries are made, the areas on the map shall still remain in the same House District. (Code, s. 2845; Rev., c. 4399; 1911, c. 151; C.S., s. 6088; 1921, c. 144; 1941, c. 112; 1961, c. 265; 1966, Ex. Sess., c. 5, s. 1; 1971, c. 483; 1981, c. 800; c. 1130, s. 1; 1982, Ex. Sess., c. 4; 1982, 2nd Ex. Sess., c. 1; 1984, Ex. Sess., c. 1, ss. 1, 2; c. 6, ss. 1-6; c. 7.)

Editor's Note. —

Session Laws 1984, Ex. Sess., c. 1, s. 2.1 provides: "In the event that the U.S. Supreme Court reverses the opinion of the U.S. District Court which held the composition of House District 8 to violate the Voting Rights Act, then Sections 1 and 2 of this Act are repealed and the prior law as to House District 8 is revived as to any future election."

Session Laws 1984, Ex. Sess., c. 6, s. 6.1, provides: "In the event that the U.S. Supreme Court reverses any or all of the opinion of the U.S. District Court which held the composition of House Districts 21, 23, 36 and 39 to violate the Voting Rights Act, then to the extent that such reversal holds any of those districts to have been valid, any part of this act which reapportioned such district is repealed and the prior law revived as to any future election."

Session Laws 1983 (Reg. Sess., 1984), c. 1095, ss. 1 through 16, provide:

"Section 1. Notwithstanding any other provisions of law to the contrary, the State Board of Elections shall set a primary election schedule for former House District 8 as redistricted by Chapter 1, Session Laws, Extra Session of 1984, or as redistricted by a court of competent jurisdiction. Such power shall extend to all the districts so created from District 8 by the General Assembly or the court.

"Sec. 2. In adopting such schedule, the State Board of Elections shall schedule the primary for August, September, October, or November of 1984.

"Sec. 3. In adopting such schedule, the State Board of Elections shall provide a filing period of at least one week and filing shall open at 12:00 noon and close at 12:00 noon.

"Sec. 4. In adopting such schedule, the State Board of Elections shall provide that the second primary if necessary be held either three, four, or five weeks after the primary.

"Sec. 5. The State Board of Elections shall prepare and distribute to the Nash, Edgecombe and Wilson County Boards of Elections a Revised Primary and General Election Timetable — 1984, setting out the applicable filing period for candidates along with all other pertinent dates relative to the election timetable for elections rescheduled by this act.

"Sec. 6. The State Board of Elections is hereby authorized, consistent with provisions in G.S. 163-188 other than the date of the canvass, to set the dates on which it shall conduct the canvass and issue its certification of the results of the 1984 primary elections rescheduled by this act and for the general election thereof.

"Sec. 7. For the 1984 primary election only, G.S. 163-112 shall be applied by substituting "10 days" for "30 days" whenever it appears, insofar as the offices of North Carolina House of Representatives for districts reapportioned by the 1984 Extra Session of the General Assembly or by a court of competent jurisdiction are concerned.

"Sec. 8. The State Board of Elections shall adopt regulations to implement this act. Adoption of such regulations is not subject to Chapter 150A of the General Statutes except as to filing, publication, and judicial review of the rules. The Board may make the rules effective immediately. In lieu of the notice requirements of G.S. 163-33(8), the State Board of Elections shall prescribe an abbreviated or different notice procedure of the primary and election. The State Board of Elections may modify the deadline for filing a petition in lieu of fee under G.S. 163-107.1.

"Sec. 9. Absentee voting shall be allowed for any primaries and elections scheduled under this act, but the State Board of Elections is authorized to modify the beginning period for absentee voting to allow for the abbreviated election timetable and to coordinate absentee voting for the primary and general election in House District 8 as redistricted with absentee voting in other primaries and elections.

"Sec. 10. Whenever in any apportionment plan for the North Carolina House of Representatives covered by this act a precinct is placed in two or more districts, then the county board of elections, with the approval of the State Board of Elections may, for the 1984 primary and general election:

"(1) Divide the precinct into two or more precincts.

"(2) Change precinct lines to place part or parts of the precinct with a precinct which has the same election district.

"(3) Keep the same precinct but ascertain either in advance or on the date of the primary or general election which district the voter resides in, and give the voter the ballots for the appropriate district. This may be accomplished by a paper ballot for the office even if a machine is used for other offices or other voters.

"(4) Provide some other procedure to ensure that each voter does not cast ballots in more than one district.

"In adopting a procedure under this section, the Board shall attempt to use the method which is least disruptive to the voter, and any action to change precinct lines shall be taken in accordance with G.S. 163-28 except that notice shall be given not less than 20 days prior to the primary or general election instead of 20 days prior to the close of registration.

"Sec. 11. In setting a primary schedule under this act, the State Board of Elections shall adopt a schedule that is administratively feasible while still allowing an adequate time for candidate filing and electioneering.

"Sec. 12. If in adopting a primary schedule for districts under this act in accordance with the guidelines of Sections 2, 4, and 11 of this act, the State Board of Elections finds that it is administratively impossible to hold the general election in such districts on November 6, 1984, it may reschedule the general election in such districts to some date in December of 1984.

"Sec. 13. Section 6 of Chapter 2, Session Laws, Extra Session of 1984 shall apply to the primary and election rescheduled by this act, and shall also apply if the redistricting is done by court order.

"Sec. 14. The State Board of Elections may modify any schedule it sets under this act to meet any objections of the U.S. Department of justice or the court.

"Sec. 15. The Legislative Services Officer shall send a copy of this act to the Edgecombe, Nash, and Wilson County Boards of Elections.

"Sec. 16. This act is effective upon ratification."

The act was ratified July 5, 1984.

Effect of Amendments. —

The 1984, Ex. Sess., amendment by c. 1, effective March 8, 1984, rewrote the paragraph relating to District 8 and inserted the paragraph relating to District 70.

The 1984, Ex. Sess., amendment by c. 6, effective March 8, 1984, in subsection (a) substituted "1984" for "1982" in the introductory paragraph, substituted the present paragraphs relating to Districts 36 and 54 through 60 for the former paragraph relating to District 36, substituted the present paragraphs relating to Districts 21 and 61 through 65 for the former paragraph relating to District 21, substituted the present paragraphs relating to Districts 39, 66 and 67 for the former paragraph relating to District 39, and substituted the present paragraphs relating to Districts 23, 68 and 69 for the former paragraph relating to District 23, and in subsection (c) inserted the second paragraph.

Session Laws 1984, Ex. Sess., c. 7, makes Session Laws 1984, Ex. Sess., c. 6, effective upon ratification. The act was ratified March 8, 1984.

§ 120-3. (Effective upon the convening of the 1985 Regular Session) Pay of members and officers of the General Assembly.

(a) The Speaker of the House shall be paid an annual salary of twenty-five thousand forty-four dollars ($25,044) payable monthly and an expense allowance of seven hundred seventy dollars ($770.00) per month. The President Pro Tempore of the Senate shall be paid an annual salary of fifteen thousand dollars ($15,000) payable monthly and an expense allowance of five hundred dollars ($500.00) per month. The Speaker Pro Tempore of the House shall be paid an annual salary of twelve thousand five hundred four dollars ($12,504) payable monthly and an expense allowance of two hundred seventy-nine dollars ($279.00) per month. The minority leader in the House, and the majority and minority leader in the Senate shall each be paid an annual salary of ten thousand five hundred dollars ($10,500) payable monthly, and an expense allowance of two hundred seventy-nine dollars ($279.00) per month.

(b) Every other member of the General Assembly shall receive increases in annual salary and expense allowances only to the extent of and in the percentage equal to those received by employees of the State as general across-the-board pay increases, effective upon convening of the next regular session of the General Assembly after enactment of such percentage increase. Accordingly, upon convening of the 1985 Regular Session of the General Assembly, every other member of the General Assembly shall be paid an annual salary of eight thousand four hundred dollars ($8,400) payable monthly, and an expense allowance of two hundred nine dollars ($209.00) per month.

(c) The salary and expense allowances provided in this section are in addition to any per diem compensation and any subsistence and travel allowance authorized by any other law with respect to any regular or extra session of the General Assembly, and service on any State board, agency, commission, standing committee and study commission. (1929, c. 2, s. 1; 1951, c. 23, s. 1; 1965, c. 917; c. 1157, s. 1; 1967, c. 1120; 1969, c. 1278, s. 1; 1971, c. 1200, s. 5; 1973, c. 1482, s. 1; 1977, 2nd Sess., c. 1249, ss. 1, 2; 1979, 2nd Sess., c. 1137, s. 9.1; 1983, c. 761, s. 203; 1983 (Reg. Sess., 1984), c. 1034, s. 209.)

For this section as in effect until the convening of the 1985 Regular Session, see the bound volume.

Editor's Note. — Session Laws 1983, c. 761, s. 259, and Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, are severability clauses.

Effect of Amendments. — The 1983 amendment by c. 761, effective upon the convening of the 1985 Regular Session of the General Assembly, rewrote this section.

The 1983 (Reg. Sess., 1984) amendment by c. 1034, also effective upon the convening of the 1985 Regular Session, rewrote subsection (a), which as amended by Session Laws 1983, ch. 761, had allotted the Speaker of the House an annual salary of $20,000 and an expense allowance of $700.00 per month and had allotted the President Pro Tempore of the Senate, the Speaker Pro Tempore of the House, the minority leader in the House, and the majority and minority leader in the Senate an annual salary of $9,540 and an expense allowance of $253 per month, and substituted "eight thousand four hundred dollars ($8,400)" for "seven thousand six hundred thirty-two dollars ($632)" and "two hundred nine dollars ($209.00)" for "one hundred ninety dollars ($190.00)" in subsection (b) as amended by Session Laws 1983, c. 761.

§ 120-3.1. (Effective until the convening of the 1985 Regular Session) Subsistence and travel allowances for members of the General Assembly.

(a) In addition to compensation for their services, members of the General Assembly shall be paid the following allowances:

(1) A weekly travel allowance for each week or fraction thereof that the General Assembly is in regular or extra session. The amount of the weekly travel allowance shall be calculated for each member by multiplying the actual round-trip mileage from that member's home to the City of Raleigh by the rate per mile allowed to State employees for official travel.

(2) A travel allowance at the rate allowed by statute for State employees whenever the member travels, whether in or out of session, as a representative of the General Assembly or of its committees or commissions, with the approval of the Legislative Services Commission.

(3) A subsistence allowance for meals and lodging of fifty dollars ($50.00) a day for each day of the period during which the General Assembly is in session and, except as otherwise provided in this subdivision, when traveling as a representative of the General Assembly or of its

§ 120-3.1 is set out twice. See section heading for effective dates.

committees or commissions, with the approval of the Legislative Services Commission, when the General Assembly is not in session.

A member who is authorized to travel, whether in or out of session, to a high rate geographical area in a state in the continental United States, other than Alaska or North Carolina, may elect to receive, in lieu of the amount provided in the preceding paragraph, a subsistence allowance for meals of sixteen dollars and fifty cents ($16.50) a day and a subsistence allowance for lodging of actual lodging expenses, when evidenced by a receipt satisfactory to the Legislative Administrative Officer, not to exceed that allowed a federal employee when traveling to that area. A high rate geographical area is an area designated as such by the federal General Services Administrator under the Travel Expense Amendments Act of 1975 and published at 48 Federal Register 55262, December 9, 1983.

A member who is authorized to travel, whether in or out of session, to Alaska, Hawaii, Puerto Rico, or United States territories and possessions may elect to receive, in lieu of the amount provided in the first paragraph of this subdivision, a subsistence allowance for meals of sixteen dollars and fifty cents ($16.50) a day and a subsistence allowance for lodging of actual lodging expenses, when evidenced by a receipt satisfactory to the Legislative Administrative Officer, not to exceed the maximum prescribed by the Secretary of Defense in Civilian Personnel Per Diem Bulletin 120, dated October 3, 1983, and published as corrected at 48 Federal Register 49333, October 25, 1983.

(4) A member may be reimbursed for registration fees as permitted by the Legislative Services Commission.

(b) Payment of travel and subsistence allowances shall be made to members of the General Assembly only after certification by the claimant as to the correctness thereof on forms prescribed by the Legislative Services Commission. Claims for travel and subsistence payments shall be paid at such times as may be prescribed by the Legislative Services Commission.

(c) When the General Assembly by joint action of the two houses adjourns to a day certain, which day is more than three days after the date of adjournment, the period between the date of adjournment and the date of reconvening shall for the purposes of this section be deemed to be a period when the General Assembly is not in session, and no member shall be entitled to subsistence and travel allowance during that period, except under circumstances which would entitle him to subsistence and travel allowance when the General Assembly is not in session. (1957, c. 8; 1959, c. 939; 1961, c. 889; 1965, c. 86, s. 1; 1969, c. 1257, s. 1; 1971, c. 1200, ss. 1-4; 1973, c. 1482, s. 2; 1977, 2nd Sess., c. 1249, ss. 3, 4; 1979, 2nd Sess., c. 1137, s. 30; 1983, c. 761, ss. 25, 26; 1983 (Reg. Sess., 1984), c. 1034, s. 184.)

Section Set Out Twice. — The section above is effective until the convening of the 1985 Regular Session of the General Assembly. For this section as amended effective upon the convening of the 1985 Regular Session, see the following section, also numbered 120-3.1.

Editor's Note. — Session Laws 1983, c. 761, s. 259, is a severability clause.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 amendment by c. 761, s. 26, effective July 15, 1983, added a last sentence to subdivision (a)(2) as it read prior to the amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 184.

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 184, effective July 1, 1984, rewrote subdivisions (a)(2), (a)(3) and (a)(4).

§ 120-3.1 is set out twice. See section heading for effective dates.

§ 120-3.1. (Effective upon the convening of the 1985 Regular Session) Subsistence and travel allowances for members of the General Assembly.

(a) In addition to compensation for their services, members of the General Assembly shall be paid the following allowances:

(1) A weekly travel allowance for each week or fraction thereof that the General Assembly is in regular or extra session. The amount of the weekly travel allowance shall be calculated for each member by multiplying the actual round-trip mileage from that member's home to the City of Raleigh by the rate per mile allowed to State employees for official travel.

(2) A travel allowance at the rate allowed by statute for State employees whenever the member travels, whether in or out of session, as a representative of the General Assembly or of its committees or commissions, with the approval of the Legislative Services Commission.

(3) A subsistence allowance for meals and lodging of sixty dollars ($60.00) a day for each day of the period during which the General Assembly is in session and, except as otherwise provided in this subdivision, when traveling as a representative of the General Assembly or of its committees or commissions, with the approval of the Legislative Services Commission, when the General Assembly is not in session.

A member who is authorized to travel, whether in or out of session, to a high rate geographical area in a state in the continental United States, other than Alaska or North Carolina, may elect to receive, in lieu of the amount provided in the preceding paragraph, a subsistence allowance for meals of twenty dollars ($20.00) a day and a subsistence allowance for lodging of actual lodging expenses, when evidenced by a receipt satisfactory to the Legislative Administrative Officer, not to exceed that allowed a federal employee when traveling to that area. A high rate geographical area is an area designated as such by the federal General Services Administrator under the Travel Expense Amendments Act of 1975 and published at 48 Federal Register 55262, December 9, 1983.

A member who is authorized to travel, whether in or out of session, to Alaska, Hawaii, Puerto Rico, or United States territories and possessions may elect to receive, in lieu of the amount provided in the first paragraph of this subdivision, a subsistence allowance for meals of twenty dollars ($20.00) a day and a subsistence allowance for lodging of actual lodging expenses, when evidenced by a receipt satisfactory to the Legislative Administrative Officer, not to exceed the maximum prescribed by the Secretary of Defense in Civilian Personnel Per Diem Bulletin 120, dated October 3, 1983, and published as corrected at 48 Federal Register 49333, October 25, 1983.

(4) A member may be reimbursed for registration fees as permitted by the Legislative Services Commission.

(b) Payment of travel and subsistence allowances shall be made to members of the General Assembly only after certification by the claimant as to the correctness thereof on forms prescribed by the Legislative Services Commission. Claims for travel and subsistence payments shall be paid at such times as may be prescribed by the Legislative Services Commission.

(c) When the General Assembly by joint action of the two houses adjourns to a day certain, which day is more than three days after the date of adjournment, the period between the date of adjournment and the date of reconvening

§ 120-3.1 is set out twice. See section heading for effective dates.

shall for the purposes of this section be deemed to be a period when the General Assembly is not in session, and no member shall be entitled to subsistence and travel allowance during that period, except under circumstances which would entitle him to subsistence and travel allowance when the General Assembly is not in session. (1957, c. 8; 1959, c. 939; 1961, c. 889; 1965, c. 86, s. 1; 1969, c. 1257, s. 1; 1971, c. 1200, ss. 1-4; 1973, c. 1482, s. 2; 1977, 2nd Sess., c. 1249, ss. 3, 4; 1979, 2nd Sess., c. 1137, s. 30; 1983, c. 761, ss. 25, 26; 1983 (Reg. Sess., 1984), c. 1034, ss. 184, 186.)

Section Set Out Twice. — The section above is effective upon the convening of the 1985 Regular Session of the General Assembly. For this section as in effect until the convening of the 1985 Regular Session, see the preceding section, also numbered 120-3.1.

Editor's Note. — Session Laws 1983, c. 761, s. 259, is a severability clause.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 amendment by c. 761, s. 26, effective July 15, 1983, added a last sentence to subdivision (a)(2) as it read prior to the amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 184.

The 1983 amendment by c. 761, s. 25, effective upon the convening of the 1985 Regular Session of the General Assembly, substituted "sixty dollars ($60.00)" for "forty-four dollars ($44.00)" in subdivision (a)(3) as it read prior to the amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 184 and substituted "sixty dollars ($60.00)" for "fifty dollars ($50.00)" in subdivision (a)(4) as it read prior to the amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 184.

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 184, effective July 1, 1984, rewrote subdivisions (a)(2), (a)(3) and (a)(4).

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 186, effective upon the convening of the 1985 Regular Session of the General Assembly, substituted "sixty dollars ($60.00)" for "fifty dollars ($50.00)" and "twenty dollars ($20.00)" for "sixteen dollars and fifty cents ($16.50)" in subdivision (a)(3) as amended by c. 1034, s. 184.

The section is set out above as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1034, ss. 184 and 186.

Article 1A.

Legislative Retirement System.

§ 120-4.8. Definitions.

The following words and phrases as used in this Article, unless the context clearly requires otherwise, have the following meanings:

(9) "Member in service" means a member in service on or after June 15, 1983.

(12) "Present member of the General Assembly" means a person who is a member of the General Assembly on or after June 15, 1983.

(1983, c. 761, s. 238; 1983 (Reg. Sess., 1984), c. 1034, s. 198.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "June 15, 1983" for "July 15, 1983" in subdivisions (9) and (12).

§ 120-4.11. Membership.

The membership of this Retirement System is as follows:

(1) All present members of the General Assembly who are not actively contributing members of any of the following retirement systems: The Teachers' and State Employees' Retirement System, the North Carolina Local Governmental Employees' Retirement System, the

§ 120-3.1 is set out twice. See section heading for effective dates.

Law-Enforcement Officers' Retirement System, the Uniform Judicial Retirement System of North Carolina, the Uniform Solicitorial Retirement System of North Carolina or the Uniform Clerks of Superior Court Retirement System of North Carolina. Membership shall also include members vested in or maintaining member contributions in the Legislative Retirement Fund established by Chapter 1269, 1969 Session Laws, who elect to transfer to the Retirement System.

(2) All former members of the General Assembly who are retirees of the Legislative Retirement Fund established by Chapter 1269, 1969 Session Laws, who are not actively contributing members of any of the following retirement systems: The Teachers' and State Employees' Retirement System, the North Carolina Local Governmental Employees' Retirement System, the Law-Enforcement Officers' Retirement System, the Uniform Judicial Retirement System of North Carolina, the Uniform Solicitorial Retirement System of North Carolina of the Uniform Clerks of Court Retirement System of North Carolina and who elect to transfer to the Retirement System.

(3) All former members of the General Assembly who have eight or more years of creditable service, who are not otherwise members of the Legislative Retirement System pursuant to subdivisions (1) and (2) of this section, and who are not actively contributing members of the Teachers' and State Employees' Retirement System, the North Carolina Local Governmental Employees' Retirement System, the Law Enforcement Officers' Retirement System, the Uniform Judicial Retirement System of North Carolina, the Uniform Solicitorial Retirement System of North Carolina, or the Uniform Clerks of the Superior Court Retirement System of North Carolina. (1983, c. 761, s. 238; 1983 (Reg. Sess., 1984), c. 1034, ss. 188, 189.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "actively contributing members" for "active members" and "Law-Enforcement Officers' Retirement System" for "Law-Enforcement Officers' Benefit and Retirement Fund" in subdivisions (1) and (2) and added subdivision (3).

§ 120-4.12. Creditable service.

(c) Prior service means:

(1) The number of years a present member of the General Assembly served in the General Assembly prior to becoming a member of the Retirement System;

(2) The number of years served by former members of the General Assembly who were vested in the Legislative Retirement Fund. One year of prior service is equal to 12 months for which a legislator received compensation.

(d) Any member of the Retirement System who has eight or more years of creditable service as a member of the General Assembly may purchase prior service credit for service in the armed forces of the United States at the same rates and conditions as set forth in G.S. 120-4.14 and G.S. 120-4.16; provided that credit is allowed only for the initial period of active duty in the armed forces of the United States up to the time the member was first eligible to be separated or released therefrom, and subsequent periods of such active duty as required by the armed forces of the United States up to the date of first eligibility for separation or release therefrom; and further provided that the member submits satisfactory evidence of the service claimed and that service credit be

allowed only for the period of active service in the armed forces of the United States not creditable in any other retirement system, except the national guard or any reserve component of the armed forces of the United States. (1983, c. 761, s. 238; 1983 (Reg. Sess., 1984), c. 1034, ss. 187, 190.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "becoming a member" for "the establishment" in subdivision (c)(1) and added subsection (d).

§ 120-4.14. Purchase of prior service.

Purchase of prior service rendered by a member of the General Assembly before becoming a member of the Retirement System that is not service that may be transferred pursuant to G.S. 120-4.12 shall be at the rate of one month of service for each month for which a legislator received compensation, computed as follows:

(1) For terms beginning with the 1975 General Assembly, seven percent (7%) of the highest legislative compensation at the time of purchase plus an administrative fee to be paid in lump sum.

(2) For terms beginning prior to the 1975 General Assembly, five percent (5%) of the highest legislative compensation at the time of purchase plus an administrative fee to be paid in lump sum. (1983, c. 761, s. 238; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 191.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984) c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "becoming a member of the Retirement System" for "the convening of the 1985 Regular Session of the General Assembly" in the introductory paragraph.

§ 120-4.15. Repayment of contributions.

Repayment of contributions withdrawn from the Legislative Retirement Fund and System shall be at the rate of seven percent (7%) of the highest monthly compensation received as a legislator at the time of purchase for each month of creditable service restored plus an administrative fee to be paid in lump sum. (1983, c. 761, s. 238; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 192.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted "and System."

§ 120-4.21. (Effective upon the convening of the 1985 Regular Session) Service retirement benefits.

(a) Eligibility; Application. — Any member in service may retire with full benefits who has reached 65 years of age with eight years of creditable service. Any member in service may retire with reduced benefits who has reached the age of 60 years with eight years of creditable service. The member shall make written application to the Board of Trustees to retire on a service retirement allowance on the first day of the particular calendar month he designates. The

designated date shall be no less than 30 nor more than 90 days from the filing of the application. During this period of notification, a member may separate from service without forfeiting his retirement benefits.

(b) Computation. — Upon retirement from service in accordance with subsection (a) of this section, a member shall receive a service retirement allowance computed as follows:

(1) For a member whose retirement date occurs on or after his 65th birthday and upon completion of eight years of creditable service, four percent (4%) of his "highest annual salary," multiplied by the number of years of creditable service.

(2) For a member whose retirement date occurs on or after his 60th and before his 65th birthday and upon completion of eight years of creditable service, computation as in subdivision (1) of this subsection, reduced by one-fourth of one percent (¼ of 1%) for each month his retirement date precedes his 65th birthday.

(c) Limitations. — In no event shall any member receive a service retirement allowance greater than seventy-five percent (75%) of his "highest annual salary" nor shall he receive any service retirement allowance whatever while employed in a position that makes him a contributing member of any of the following retirement systems: The Teachers' and State Employees' Retirement System, the North Carolina Local Governmental Employees' Retirement System, the Law-Enforcement Officers' Retirement System, the Uniform Judicial Retirement System of North Carolina, the Uniform Solicitorial Retirement System of North Carolina or the Uniform Clerks of Court Retirement System of North Carolina. If he should become a member of any of these systems, payment of his service retirement allowance shall be suspended until he withdraws from membership in that system. (1983, c. 761, s. 238; 1983 (Reg. Sess., 1984), c. 1034, ss. 193, 194, 196.)

Editor's Note. —

Session Laws 1983, c. 761, s. 240, provides that §§ 120-4.19 through 120-4.29 shall become effective upon the convening of the 1985 Regular Session of the General Assembly, while §§ 120-4.8 through 120-4.18 are effective upon ratification (July 15, 1983).

Session Laws 1983, c. 761, s. 259 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment deleted "or who has completed 25 years of creditable service regardless of age" at the end of the first sentence of subsection (a), deleted "or upon 25 years of creditable service regardless of age" following "upon completion of eight years of creditable service" in subdivision (b)(1), and inserted "contributing" preceding "member of any of the following" and substituted "Law-Enforcement Officers' Retirement System" for "Law-Enforcement Officers' Benefit and Retirement Fund" in subsection (c). Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257 makes the act effective July 1, 1984, except where otherwise provided. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 120-4.22. (Effective upon the convening of the 1985 Regular Session) Disability retirement benefits.

(a) Eligibility; Application. — Upon application by or on behalf of the member, any member in service who has completed at least eight years of creditable service and who has not reached his 60th birthday may, after medical certification, be retired on a disability retirement allowance by the Board of Trustees on the first day of the particular calendar month designated by the applicant. The designated date shall be no less than 30 nor more than 90 days from the filing of the application.

(b) Medical Certification. — After a medical examination of the member, the medical board shall certify to the Board of Trustees that the member is

mentally or physically incapacitated for further performance of duty as a member of the General Assembly, that the incapacity was incurred at the time of active employment and has been continuous thereafter, that the incapacity is likely to be permanent and whether the member should be retired.

(c) Computation. — Upon retirement for disability pursuant to subsection (a) of this section, a member shall receive a disability retirement allowance equal to a service retirement allowance calculated on the basis of the member's "highest annual salary" and the creditable service he would have had by the age of 60 had he continued in service.

(d) Limitations. — In no event shall any member receive a disability retirement allowance greater than seventy-five percent (75%) of his "highest annual salary" nor shall he receive any disability retirement allowance whatever while employed in a position that makes him a contributing member of any of the following retirement systems: The Teachers' and State Employees' Retirement System, the North Carolina Local Governmental Employees' Retirement System, the Law-Enforcement Officers' Retirement System, the Uniform Judicial Retirement System of North Carolina, the Uniform Solicitorial Retirement System of North Carolina or the Uniform Clerks of Court Retirement System of North Carolina. If he should become a member of any of these systems payment of his disability retirement allowance shall be suspended until he withdraws from membership in that system. (1983, c. 761, s. 238; 1983 (Reg. Sess., 1984), c. 1034, ss. 195, 196.)

Editor's Note. —

Session Laws 1983, c. 761, s. 240, provides that §§ 120-4.19 through 120-4.29 shall become effective upon the convening of the 1985 Regular Session of the General Assembly, while §§ 120-4.8 through 120-4.18 are effective upon ratification (July 15, 1983).

Session Laws 1983, c. 761, s. 259 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment deleted "but less than 25 years" following "eight years of creditable service" in the first sentence of subsection (a) and in subsection (d) inserted "contributing" preceding "member of any of the following" and substituted "Law-Enforcement Officers' Retirement System" for "Law-Enforcement Officers' Benefit and Retirement Fund." Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257 makes the act effective July 1, 1984, except where otherwise provided. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 120-4.25. (Effective upon the convening of the 1985 Regular Session) Return of accumulated contributions.

If a member ceases to be a member of the General Assembly except by death or retirement, he shall, upon submission of an application, be paid not earlier than 60 days following the date of termination of service, the sum of his contributions if he has less than eight years of creditable service, or the sum of his accumulated contributions if he has eight or more years of creditable service, provided he has not in the meantime returned to service. Upon payment of this sum his membership in the System ceases. If he becomes a member afterwards, no credit shall be allowed for any service previously rendered except as provided in G.S. 120-4.14 and the payment shall be in full and complete discharge of any rights in or to any benefits otherwise payable under this Article. Upon receipt of proof satisfactory to the Board of Trustees of the death, prior to retirement, of a member or former member, there shall be paid to the person or persons he nominated by written designation duly acknowledged and filed with the Board of Trustees, if the person or persons are living at the time of the member's death, otherwise to the member's legal representatives, the amount of his accumulated contributions at the time of his

death, unless the beneficiary elects to receive the alternate benefit under the provisions of G.S. 120-4.28. There shall be deducted from any amount otherwise payable any amount due any agency or subdivision of the State by the member by reason of any outstanding overpayment of salary or by any other reason. Even if the member fails to demand the return of his accumulated contributions within 90 days from the day he ceases to be a member of the General Assembly, any amount due the agency or subdivision by reason of any outstanding overpayment of salary or any other reason shall be paid to the agency or subdivision by the Retirement System upon demand. After the agency or subdivision has notified the executive director of any amount due. The Retirement System has no liability for amounts deducted and transmitted to the agency or subdivision nor for any failure by the Retirement System for any reason to make the deductions. (1983, c. 761, s. 238; 1983 (Reg. Sess., 1984), c. 1034, s. 197.)

Editor's Note. —

Session Laws 1983, c. 761, s. 240, provides that §§ 120-4.19 through 120-4.29 shall become effective upon the convening of the 1985 Regular Session of the General Assembly, while §§ 120-4.8 through 120-4.18 are effective upon ratification (July 15, 1983).

Session Laws 1983, c. 761, s. 259 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment rewrote the first sentence, which read "If a member ceases to be a member of the General Assembly except by death or retirement, he shall, upon submission of an application, be paid, not earlier than 60 days from receipt in the Raleigh offices of the Board of Trustees of an acceptable application on a form provided by the Retirement System, the sum of his contributions, if he has not in the meantime returned to service." Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257 makes the act effective July 1, 1984, except where otherwise provided. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 120-4.28. (Effective upon the convening of the 1985 Regular Session) Survivor's alternate benefit.

The designated beneficiary of a member who dies before retirement but after age 60 and after completing eight years of creditable service is entitled to Option 2 prescribed by G.S. 120-4.26. (1983, c. 761, s. 238; 1983 (Reg. Sess., 1984), c. 1034, s. 199.)

Editor's Note. —

Session Laws 1983, c. 761, s. 240, provides that §§ 120-4.19 through 120-4.29 shall become effective upon the convening of the 1985 Regular Session of the General Assembly, while §§ 120-4.8 through 120-4.18 are effective upon ratification (July 15, 1983).

Session Laws 1983, c. 761, s. 259 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment substituted "G.S. 120-4.26" for "G.S. 120-4.25" at the end of the section. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257 makes the act effective July 1, 1984, except where otherwise provided. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

ARTICLE 3A.

Sessions; Electronic Voting.

§ 120-11.1. Time of meeting.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 949 provides that the 1985 Regular Session of the Senate and House of Representatives shall be held beginning on the first Tuesday in February of 1985 at 12:00 o'clock noon, and that § 120-11.1 shall not apply to the 1985 Regular Session.

Article 6B.

Legislative Research Commission.

§ 120-30.11. Time of appointments; terms of office.

Appointments to the Legislative Research Commission shall be made not earlier than the close of each regular session of the General Assembly held in the odd-numbered year nor later than 15 days subsequent to the close. The term of office shall begin on the day of appointment, and shall end on December 15 of the next even-numbered year. Except for the work of the Administrative Rules Review Committee, no moneys appropriated to the Legislative Research Commission may be expended for meetings of the Commission, its committees or subcommittees held after December 15 of the next even-numbered year and before the appointment of the next Legislative Research Commission. (1965, c. 1045, s. 2; 1975, c. 692, s. 2; 1977, c. 915, s. 4; 1981, c. 688, s. 19; 1983, c. 63, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 178.)

Editor's Note. —
Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "December 15," for "the fourth Friday in November" in the second and third sentences.

Article 7.

Legislative Services Commission.

§ 120-32. Commission duties.

The Legislative Services Commission is hereby authorized to:

(11) To specify the uses within the General Assembly budget of funds appropriated to the General Assembly which remain available for expenditure after the end of the biennial fiscal period, and to revert funds under G.S. 143-18. (1969, c. 1184, s. 2; 1971, c. 685, s. 2; c. 1200, s. 8; 1977, c. 802, s. 50.60; 1981 (Reg. Sess., 1982), c. 1191, s. 67; 1983 (Reg. Sess., 1984), c. 1034, s. 182.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 180, provides:

"(a) Notwithstanding G.S. 143-18, funds appropriated to the General Assembly by Chapter 859, 1127, and 1282 of the 1981 Session Laws shall not revert to the General Fund but shall remain available to the General Assembly until expended or until reverted under G.S. 120-32(10).

"(b) The funds covered by this section may be encumbered for such purpose as may be approved by the Director of the Budget.

"(c) This section is effective June 30, 1983."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added subdivision (11).

§ 120-32.01. Information to be supplied.

(a) Every State department, State agency, or State institution shall furnish the Legislative Administrative Office and the Research, Fiscal Research, and Bill Drafting Divisions any information or records requested by them. Except when accessibility is prohibited by a federal statute, federal regulation or State

statute, every State department, State agency, or State institution shall give the Fiscal Research Division access to any data base or stored information maintained by computer, telecommunications, or other electronic data processing equipment, whether stored on tape, disk, or otherwise, and regardless of the medium for storage or transmission.

(b) Notwithstanding subsection (a) of this section, access to the State Personnel Management Information System by the Legislative Administrative Office and by the Research and Bill Drafting Divisions shall only be through the Fiscal Research Division. (1983 (Reg. Sess., 1984), c. 1034, s. 177.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, is a severability clause.

§ 120-34. Printing of session laws.

(a) The Legislative Services Commission shall publish all laws and joint resolutions passed at each session of the General Assembly. The laws and joint resolutions shall be kept separate and indexed separately. Each volume shall contain a certificate from the Secretary of State stating that the volume was printed under the direction of the Legislative Services Commission from ratified acts and resolutions on file in the Office of the Secretary of State. The Commission may publish the Session Laws and House and Senate Journals of extra and special sessions of the General Assembly in the same volume or volumes as those of regular sessions of the General Assembly. In printing, the signatures of the presiding officers shall be omitted.

(1969, c. 1184, s. 4; 1971, c. 685, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 179.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective Jan. 1, 1984, rewrote subsection (a).

Article 7A.

Fiscal Research Division.

§ 120-36.4: Repealed by Session Laws 1983 (Regular Session 1984), c. 1034, s. 176, effective July 1, 1984.

Cross References. —As to the furnishing of information by State departments, agencies, or institutions, see now § 120-32.01.

§ 120-36.6. Legislative Fiscal Research staff participation.

Legislative fiscal research staff members may attend all meetings of the Advisory Budget Commission and all hearings conducted by or for the Commission, and may accompany the Commission to inspect the facilities of the State. The Legislative Administrative Officer shall designate a member of the Fiscal Research staff, and a member of the General Research or Bill Drafting staff who may attend all meetings of the Board of Awards and Council of State, unless the Board or Council has voted to exclude them from the specific

meeting, provided that no final action may be taken while they are so excluded. The Legislative Services Officer and the Director of Fiscal Research shall be notified of all such meetings, hearings and trips in the same manner and at the same time as notice is given to members of the Board, Commission or Council. The Legislative Services Officer and the Director of Fiscal Research shall be provided with a copy of all reports, memoranda, and other informational material which are distributed to the members of the Board, Commission, or Council; these reports, memoranda and materials shall be delivered to the Legislative Services Officer and the Director of Fiscal Research at the same time that they are distributed to the members of the Board, Commission, or Council. (1971, c. 659, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 177.1.)

Editor's Note. — This section was formerly § 43-34.4. It was transferred to its present position by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 177.1(d).

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted the present second sentence, inserted "and the Director of Fiscal Research" following "Legislative Services Officer" in two places in the last sentence, and substituted "Board, Commission, or Council" for "Commission" in three places in the last two sentences.

Article 8.

Elected Officers.

§ 120-37. Elected officers; salaries; staff.

(b) The sergeant-at-arms and the reading clerk in each house shall be paid a salary of one hundred fifty dollars ($150.00) per week, plus subsistence at the same daily rate provided for members of the General Assembly, plus mileage at the rate provided for members of the General Assembly for one round trip only from their homes to Raleigh and return. The sergeants-at-arms shall serve during sessions of the General Assembly and at such time prior to the convening of, and subsequent to adjournment or recess of, sessions as may be authorized by the Legislative Services Commission. The reading clerks shall serve during sessions only.

(c) The principal clerks shall be full-time officers. Each principal clerk shall be paid an annual salary of thirty-two thousand five hundred twenty dollars ($32,520), payable monthly. The Legislative Services Commission shall review the salary of the principal clerks prior to submission of the proposed operating budget of the General Assembly to the Governor and Advisory Budget Commission and shall make appropriate recommendations for changes in those salaries. Any changes enacted by the General Assembly shall be by amendment to this paragraph.

(1969, c. 1184, s. 7; 1977, 2nd Sess., c. 1278; 1979, c. 838, s. 82; 1979, 2nd Sess., c. 1137, s. 8; 1981, c. 1127, s. 9; 1983, c. 761, s. 197; 1983 (Reg. Sess., 1984), c. 1034, s. 208; c. 1116, s. 110.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 208, effective July 1, 1984, substituted "thirty-two thousand five hundred twenty dollars ($32,520)" for "twenty-seven thousand twelve dollars ($27,012)" in the first sentence of subsection (c).

The 1983 (Reg. Sess., 1984) amendment by c. 1116, s. 110, effective July 1, 1984, substituted "one hundred fifty dollars ($150.00)" for "one hundred twenty-six dollars ($126.00)" in the first sentence of subsection (b).

Article 16.

Legislative Appointments to Boards and Commissions.

§ 120-123. Service by members of the General Assembly on certain boards and commissions.

No member of the General Assembly may serve on any of the following boards or commissions:

(11) Repealed by Session Laws 1983 (Regular Session, 1984), c. 995, s. 4.

(16) The Governor's Commission on Governmental Productivity, as established by G.S. 136-64.

(1981 (Reg. Sess., 1982), c. 1191, s. 2; 1983, c. 328, s. 1.1; c. 558, s. 5; c. 559, s. 4; c. 717, ss. 2, 3, 43.2, 99, 105, 110; c. 761, s. 179; c. 778, s. 2; c. 786, s. 9; c. 789, s. 2; c. 832, s. 2; c. 871, s. 3; c. 899, s. 3; 1983 (Reg. Sess., 1984), c. 995, ss. 4, 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, deleted subdivision (11), which read "The North Carolina Land Conservancy Corporation, as established by G.S. 113A-137," and rewrote subdivision (16), which formerly read "The Committee for Incentive Pay for State Employees, as established by G.S. 126-64."

Article 17.

Confidentiality of Legislative Communications.

§ 120-129. Definitions.

As used in this Article:

(1a) "Legislative commission" means any commission or committee which the Legislative Services Commission is directed or authorized to staff by law or resolution and which it does, in fact, staff.

(2) "Legislative employee" means employees and officers of the General Assembly, consultants and counsel to members and committees of either house of the General Assembly or of legislative commissions who are paid by State funds, and employees of the Institute of Government; but does not mean legislators and members of the Council of State.

(3) "Legislator" means a member-elect, member-designate, or member of the North Carolina Senate or House of Representatives. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 29, 1984, inserted subdivision (1a), inserted "or of legislative commissions" in subdivision (2), and substituted "member-elect, member-designate, or" for "duly elected or appointed" in subdivision (3).

§ 120-131. Documents produced by legislative employees.

(b) A document prepared by a legislative employee upon the request of a legislator becomes available to the public when the document is a:

(1) Bill or resolution and it has been introduced;
(2) Proposed amendment or committee substitute for a bill or resolution and it has been offered at a committee meeting or on the floor of a house;
(3) Proposed conference committee report and it has been offered at a joint meeting of the conference committees; or
(4) Bill, resolution, memorandum, written analysis, letter, or other document resulting from a drafting or information request and it has been distributed at a legislative commission or standing committee or subcommittee meeting not held in executive session or on the floor of a house.

A document prepared by a legislative employee upon the request of any legislator, that pursuant to this Article does not become available to the public, is not a "public record," as defined by G.S. 132-1.

(1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 29, 1984, substituted "legislative commission" for "study commission, or study" in subdivision (b)(4).

§ 120-132. Testimony by legislative employees.

No present or former legislative employees may be required to disclose any information that the individual, while employed or retained by the State, may have acquired:

(1) In a standing, select, or conference committee or subcommittee of either house of the General Assembly or a legislative commission;
(2) On the floor of either house of the General Assembly, or in any office of a legislator;
(3) As a result of communications that are confidential under G.S. 120-130 and G.S. 120-131.

Notwithstanding the provisions of the preceding sentence, the presiding judge of a court of competent jurisdiction may compel that disclosure, if in his opinion, the same is necessary to a proper administration of justice. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, s. 5.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 29, 1984, inserted "or a legislative commission" at the end of subdivision (1).

§ 120-134. Penalty.

Violation of any provision of this Article shall be grounds for disciplinary action in the case of employees and for removal from office in the case of public officers. No criminal penalty shall attach for any violation of this Article. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, s. 6.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 29, 1984, substituted "this Article" for "this section [Article]" in the first sentence.

§§ 120-135 to 120-139: Reserved for future codification purposes.

ARTICLE 18.

Review of Proposals to License New Occupations and Professions.

§ 120-140. Findings and purposes.

The General Assembly finds that the number of licensed occupations and professions has substantially increased and that licensing boards have occasionally been established without a determination that the police power of the State is reasonably exercised by the establishment of such licensing boards. The General Assembly further finds that by establishing criteria and procedures for reviewing proposed occupational and professional boards, it will be better able to evaluate the need for new licensing boards. To this end it is the purpose of this Article to assure that no new licensing board shall be established unless the following criteria are met:

(1) The unregulated practice of the profession or occupation can substantially harm or endanger the public health, safety or welfare, and the potential for such harm is recognizable and not remote or dependent upon tenuous argument;

(2) The profession or occupation possesses qualities that distinguish it from ordinary labor;

(3) Practice of the profession or occupation requires specialized skill or training;

(4) A substantial majority of the public does not have the knowledge or experience to evaluate whether the practitioner is competent; and

(5) The public is not effectively protected by other means. (1983 (Reg. Sess., 1984), c. 1089, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1089, s. 2, makes this Article effective August 1, 1984, and provides that it shall expire January 1, 1987.

§ 120-141. Definitions.

As used in this Chapter:

(1) "Assessment report" means a report that initially describes the need for and the fiscal impact of a new licensing board.

(2) "Committee" means the Legislative Committee on New Occupational and Professional Licensing Boards.

(3) "Licensing" means a regulatory system that requires persons to meet certain qualifications before they are eligible to engage in a particular occupation or profession.

(4) "Supplementary report" means a report that assesses the changes proposed by an amendment or committee substitute which would alter a legislative proposal to create a new occupational licensing board and for which an assessment report has already been prepared. (1983 (Reg. Sess., 1984), c. 1089, s. 1.)

§ 120-142. Assessment of proposed occupational and professional licensing boards.

(a) Every legislative proposal introduced in the General Assembly after August 1, 1984, proposing (1) the establishment of an occupational or professional licensing board, or (2) a study of the need to establish an occupational or professional licensing board shall have attached to it, at the time of its consideration by any committee of either house of the General Assembly, an assessment report which shall describe the need for the proposed occupational or professional licensing board. Assessment reports shall be attached to the original of each legislative proposal to establish a new licensing board which is reported favorably by any committee of either house of the General Assembly, but shall be separate therefrom, shall be clearly designated as assessment reports, and shall not constitute any part of the expression of legislative intent proposed by the formation of a licensing board.

(b) If the proposal to establish an occupational or professional licensing board is first contained in a legislative proposal, the sponsor shall present a copy of the legislative proposal to the Legislative Committee on New Occupational and Professional Licensing Boards which shall prepare an assessment report. If the proposal is not in the form of a legislative proposal, the person or organization seeking to establish an occupational or professional licensing board may obtain an assessment report from the Committee only if a legislator requests such report.

(c) Assessment reports shall be prepared and returned to the requesting legislator as soon as possible and not later than 60 days after the Committee receives the request, provided that if the volume of requests makes preparation of all such reports impossible within that time, the Committee may extend the time for preparation of any report to a maximum of 90 days from the time the request is received. Supplementary reports shall be prepared and returned to the appropriate committee chairman or sponsor or requesting legislator not later than 30 days after the Committee receives the request. The Committee shall not consider any request until it has received the information required by G.S. 120-143(a).

(d) The Committee shall make all reports, including supplementary reports, available to all members of the General Assembly. At least one copy of all preliminary and final reports shall be kept in the Legislative Library for public inspection.

(e) All assessment reports shall contain an evaluation of the proposed licensing board in terms of clarity, conciseness, conformity with existing statutes and general principles of administrative law, and specificity of the delegation of authority to promulgate rules and set fees. (1983 (Reg. Sess., 1984), c. 1089, s. 1.)

§ 120-143. Procedure and criteria to be used in preparation of assessment reports.

(a) The Legislative Committee on New Occupational and Professional Licensing Boards shall conduct an evaluation of the need for each new licensing board.

If a legislator or other person or organization is seeking to establish a new occupational or professional licensing board, that legislator or other person or organization shall have the burden of demonstrating to the Committee that the criteria listed in G.S. 120-140 are met, and shall furnish the Committee additional information to show:

(1) That the unregulated practice of the occupation or profession may be hazardous to the public health, safety, or welfare;

(2) The approximate number of people who would be regulated and the number of persons who are likely to utilize the services of the occupation or profession;

(3) That the occupational or professional group has an established code of ethics, a voluntary certification program, or other measures to ensure a minimum quality of service;

(4) That other states have regulatory provisions similar to the one proposed;

(5) How the public will benefit from regulation of the occupation or profession;

(6) How the occupation or profession will be regulated, including the qualifications and disciplinary procedures to be applied to practitioners;

(7) The purpose of the proposed regulation and whether there has been any public support for licensure of the profession or occupation;

(8) That no other licensing board regulates similar or parallel functions;

(9) That the educational requirements for licensure, if any, are fully justified; and

(10) Any other information the Committee considers relevant to the proposed regulatory plan.

The Committee shall adopt an appropriate form for use by applicants. The form shall contain a list of questions to be completed by the person or organization requesting the assessment report and a copy of this Article.

(b) In preparing an assessment report with respect to a legislative proposal to establish a new occupational or professional licensing board the Committee shall consider, but shall not be limited to considering, the factors listed in subsection (a). The report shall analyze the effects of the new licensing board and shall include the Committee's recommendation on whether the General Assembly should approve the new licensing board. The Committee shall make specific findings in its report on each of the following:

(1) Whether the unregulated practice of the profession or occupation can substantially harm or endanger the public health, safety or welfare, and whether the potential for such harm is recognizable and not remote or dependent upon tenuous argument;

(2) Whether the profession or occupation possesses qualities that distinguish it from ordinary labor;

(3) Whether practice of the profession or occupation requires specialized skill or training;

(4) Whether a substantial majority of the public has the knowledge or experience to evaluate the practitioner's competence; and

(5) Whether the public can be effectively protected by other means.

(c) The Committee shall furnish a preliminary copy of the final assessment report to the requesting legislator at least 10 days before the final report is released. The requesting legislator shall have an opportunity to respond to the Committee draft. The Committee shall consider all such responses in the preparation of its final report.

(d) If the Committee recommends against licensure, it may suggest alternative measures for regulation of the occupation or profession. (1983 (Reg. Sess., 1984), c. 1089, s. 1.)

§ 120-144. Hearings by Legislative Committee on New Occupational and Professional Licensing Boards; final action by Committee.

(a) Before submitting an assessment report the Committee may, in its discretion, hold one or more public hearings in the legislative building.

(b) When assessment reports involving the same or similar occupations or professions are pending before the Committee, the Committee may consider jointly any or all of the matters to be addressed by the reports. (1983 (Reg. Sess., 1984), c. 1089, s. 1.)

§ 120-145. Legislative Committee on New Occupational and Professional Licensing Boards.

(a) The Legislative Committee on New Occupational and Professional Licensing Boards is created to consist of a Chairman and eight members, four Senators appointed by the President of the Senate, four members of the House of Representatives appointed by the Speaker of the House and the Chairman to be appointed as provided herein. The President of the Senate shall appoint a Senator to be Chairman of the Committee who shall serve until the convening of the General Assembly in 1985.

(b) The Speaker of the House shall appoint a member of the House of Representatives as Chairman upon the convening of the General Assembly in 1985 who shall serve until the organization of the General Assembly in 1987. Thereafter the President of the Senate and the Speaker of the House shall alternate the appointment of the Chairman to serve during each biennial session of the General Assembly. The Chairman may vote only in the event of a tie vote. The members of the Committee shall likewise serve biennial terms. If the Office of Chairman or any member shall become vacant, the vacancy shall be filled for the unexpired term by the authority making the initial appointment. Five members shall constitute a quorum of the Committee.

(c) The Chairman and members of the Committee, while serving on the business of the Committee, are performing legislative duties and are entitled to the subsistence and travel allowances to which members of the General Assembly are entitled when performing legislative duties if and when authorized by the Legislative Services Commission, and may meet with such approval whenever there is a request for an assessment report. The Committee is authorized to use the facilities of the State legislative building and legislative office building. Clerical and professional staff shall be provided by the Legislative Services Commission. (1983 (Reg. Sess., 1984), c. 1089, s. 1.)

Chapter 122.

Hospitals for the Mentally Disordered.

Article 1A.

Licensure of Facilities for the Mentally Ill, the Mentally Retarded and Substance Abusers.

Sec.

122-23.2. Definitions.
122-23.3. Exclusions from licensure; deemed status.

Article 12B.

Black Mountain Center, Alcohol Rehabilitation Center, and Juvenile Evaluation Center Joint Security Force.

Sec.

122-98.3. Joint security force.

Article 1A.

Licensure of Facilities for the Mentally Ill, the Mentally Retarded and Substance Abusers.

§ 122-23.2. Definitions.

As used in this Article:

(4) "Facility" means any person at one location whose primary purpose is to provide services for one or more minors or for two or more adults for the care, treatment, habilitation or rehabilitation of the mentally ill, the mentally retarded or substance abusers. When the services offered are provided to individuals who are mentally ill or mentally retarded, these services shall be day services offered to the same individual for a period of three hours or more during a 24-hour period, or residential services provided for 24 hours or more. When the services offered are provided to individuals who are substance abusers, these services shall include all outpatient services, day services offered to the same individual for a period of three hours or more during a 24-hour period, or residential services provided for 24 hours or more. Facilities for individuals who are substance abusers include chemical dependency treatment facilities.

(1983, c. 718, s. 1; 1983 (Reg. Sess., 1984), c. 1110, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, rewrote subdivision (4).

§ 122-23.3. Exclusions from licensure; deemed status.

(a) The following shall be excluded from the provisions of this Article and shall not be required to obtain licensure under this Article:

(1) Physicians and psychologists duly licensed under Chapter 90 of the General Statutes and engaged in private office practice;

(2) General hospitals licensed under Chapter 131, Article 13A, of the General Statutes, which operate special units for the mentally ill, mentally retarded or substance abusers;

(3) State and federally operated facilities;
(4) Domiciliary care homes licensed under Chapter 131D of the General Statutes;
(5) Developmental child day-care centers licensed under Chapter 110, Article 7, of the General Statutes;
(6) Persons subject to licensure under standards, rules and regulations of the Social Services Commission; and
(7) Persons subject to rules and regulations of the Division of Vocational Rehabilitation Services.

(1983, c. 718, s. 1; 1983 (Reg. Sess., 1984), c. 1110, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Chapter 131, Art. 13A, referred to in subdivision (a)(2) of this section, was repealed by Session Laws 1983, c. 775, s. 1, effective January 1, 1984. For the Hospital Licensure Act, see now § 131E-75 et seq.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, substituted "special units for the mentally ill, mentally retarded or substance abusers" for "psychiatric services" at the end of subdivision (a)(2).

Article 2F.

Area Mental Health, Mental Retardation, and Substance Abuse (Alcohol and Drug Abuse) Programs.

Part 4. Appropriations for Mental Health, Mental Retardation, and Substance Abuse Service Programs.

§ 122-35.53. Allocation of all funds to area mental health, mental retardation, and substance abuse authorities.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, sets out legislative findings with regard to the children identified as a class in the case of Willie M., et al. vs. Hunt, et al. The section also indicates the legislative intent with regard to expenditure of funds appropriated for the class members and provides for a supplemental reserve fund to be allocated to local education agencies to serve class members. In addition, the section sets out reporting requirements and authorizes the Department of Human Resources to ensure the provision of appropriate services to class members where a local program is not providing appropriate services.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 76, provides that in addition to reports required by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, the Department of Human Resources and Public Education shall report periodically to the Commission on Children with Special Needs, as requested by the Commission, on operations of programs to benefit Willie M. class members.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

ARTICLE 5A.

Involuntary Commitment.

§ 122-58.3. Affidavit and petition before clerk or magistrate; custody order.

CASE NOTES

Applied in In re Crouse, 65 N.C. App. 696, 309 S.E.2d 568 (1983).

§ 122-58.7. Inpatient commitment; district court hearing.

CASE NOTES

Order of commitment was not void on its face where the court recorded the facts by placing "x's" by the recorded facts on the order of commitment form. In re Crouse, 65 N.C. App. 696, 309 S.E.2d 568 (1983).

§ 122-58.13. Release and conditional release; judicial review.

CASE NOTES

Constitutionality. — See In re Rogers, 63 N.C. App. 705, 306 S.E.2d 510, appeal dismissed, 309 N.C. 633, 308 S.E.2d 716 (1983).

ARTICLE 12B.

Black Mountain Center, Alcohol Rehabilitation Center, and Juvenile Evaluation Center Joint Security Force.

§ 122-98.3. Joint security force.

The Department of Human Resources may designate one or more special police officers who shall make up a joint security force to enforce the laws of North Carolina and any ordinance or regulation adopted pursuant to G.S. 143-116.6 or G.S. 143-116.7 or pursuant to the authority granted the Department by any other law on the territory of the Black Mountain Center, the Alcohol Rehabilitation Center, and the Juvenile Evaluation Center, all in Buncombe County. These special police officers shall have the same powers as peace officers now vested in sheriffs and constables within the territory embraced by the named centers. (1983 (Reg. Sess., 1984), c. 1116, s. 30.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 119, makes this Article effective July 7, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Chapter 122A.

North Carolina Housing Finance Agency.

Sec.
122A-8. Bonds and notes.
122A-16. Oversight by committees of General Assembly; annual reports.

§ 122A-1. Short title.

Legal Periodicals. — For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

§ 122A-8. Bonds and notes.

The Agency is hereby authorized to provide for the issuance, at one time or from time to time, of not exceeding eight hundred fifty million dollars ($850,000,000) bonds of the Agency to carry out and effectuate its corporate purposes; provided, however, that not more than fifty million dollars ($50,000,000) bonds shall be issued prior to June 30, 1971. The Agency also is hereby authorized to provide for the issuance, at one time or from time to time of (i) bond anticipation notes in anticipation of the issuance of such bonds and (ii) construction loan notes to finance the making or purchase of mortgage loans to sponsors of residential housing for the construction, rehabilitation or improvement of residential housing; provided, however, that the total amount of bonds, bond anticipation notes and construction loan notes outstanding at any one time shall not exceed eight hundred fifty million dollars ($850,000,000) excluding therefrom any bond anticipation notes for the payment of which bonds shall have been issued. The principal of and the interest on such bonds or notes shall be payable solely from the funds herein provided for such payment. Any such notes may be made payable from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, such notes may be paid from any available revenues or assets of the Agency. The bonds or notes of each issue shall be dated and may be made redeemable before maturity at the option of the Agency at such price or prices and under such terms and conditions as may be determined by the Agency. Any such bonds or notes shall bear interest at such rate or rates as may be determined by the Local Government Commission of North Carolina with the approval of the Agency. Notes shall mature at such time or times not exceeding 10 years from their date or dates and bonds shall mature at such time or times not exceeding 43 years from their date or dates, as may be determined by the Agency. The Agency shall determine the form and manner of execution of the bonds or notes, including any interest coupons to be attached thereto, and shall fix the denomination or denominations and the place or places of payment of principal and interest, which may be any bank or trust company within or without the State. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or notes or coupons attached thereto shall cease to be such officer before the delivery thereof, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. The Agency may also provide for the authentication of the bonds or notes by a trustee or fiscal agent. The bonds or notes may be issued in coupon or in registered form, or both, as the Agency may determine, and provision may be made for the registration of any coupon bonds or notes as to principal alone and also as to both principal

and interest, and for the reconversion into coupon bonds or notes of any bonds or notes registered as to both principal and interest, and for the interchange of registered and coupon bonds or notes. Upon the filing with the Local Government Commission of North Carolina of a resolution of the Agency requesting that its bonds and notes be sold, such bonds or notes may be sold in such manner, either at public or private sale, and for such price as said Commission shall determine to be for the best interest of the Agency and best effectuate the purposes of this Chapter provided that such sale shall be approved by the Agency.

The proceeds of any bonds or notes shall be used solely for the purposes for which issued and shall be disbursed in such manner and under such restrictions, if any, as the Agency may provide in the resolution authorizing the issuance of such bonds or notes or in the trust agreement hereinafter mentioned securing the same.

Prior to the preparation of definitive bonds, the Agency may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Agency may also provide for the replacement of any bonds or notes which shall become multilated or shall be destroyed or lost.

Bonds or notes may be issued under the provisions of this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Chapter and the provisions of the resolution authorizing the issuance of such bonds or notes or the trust agreement securing the same. (1969, c. 1235, s. 8; 1973, c. 1296, s. 48; 1979, c. 844; 1979, 2nd Sess., c. 1238, s. 2; 1981, c. 343; 1983 (Reg. Sess., 1984), c. 1062, s. 2.)

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "eight hundred fifty million dollars ($850,000,000)" for "seven hundred fifty million dollars ($750,000,000)" in two places in the first paragraph.

§ 122A-16. Oversight by committees of General Assembly; annual reports.

The Finance Committee of the House of Representatives and the Finance Committee of the Senate shall exercise continuing oversight of the Agency in order to assure that the Agency is effectively fulfilling its statutory purpose; provided, however, that nothing in this Chapter shall be construed as required by the Agency to receive legislative approval for the exercise of any of the powers granted by this Chapter. The Agency shall, promptly following the close of each fiscal year, submit an annual report of its activities for the preceding year to the Governor, the Office of State Budget and Management, State Auditor, the aforementioned committees of the General Assembly, the Advisory Budget Commission and the Local Government Commission. Each such report shall set forth a complete operating and financial statement of the Agency during such year. The Agency shall cause an audit of its books and accounts to be made at least once in each year by an independent certified public accountant and the cost thereof may be paid from any available moneys of the Agency. The Agency shall on January 1 and July 1 of each year submit a written report of its activities to the Joint Legislative Commission on Governmental Operations. The Agency shall also at the end of each fiscal year submit

a written report of its budget expenditures by line item to the Joint Legislative Commission on Governmental Operations. (1969, c. 1235, s. 16; 1973, c. 1296, s. 56; 1977, c. 673, s. 3; c. 771, s. 4; 1981, c. 895, s. 4; 1981 (Reg. Sess., 1982), c. 1191, s. 34; 1983 (Reg. Sess., 1984), c. 1034, s. 134.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the last sentence.

Chapter 123.

Impeachment.

ARTICLE 1.

The Court.

§ 123-5. Causes for impeachment.

CASE NOTES

Applied in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Chapter 126.

State Personnel System.

Article 1.

State Personnel System Established.

Sec.

126-3. (Effective July 1, 1985) Office of State Personnel established; administration and supervision; appointment, compensation and tenure of Director.

Article 2.

Salaries and Leave of State Employees.

126-8.2. Replacement of law-enforcement officer on final sick leave.

Article 6.

Equal Employment Opportunity; Assisting in Obtaining State Employment.

126-16. (Effective July 1, 1986) Equal opportunity for employment and compensation by State departments and agencies and local political subdivisions.

Article 11.

Governor's Commission on Governmental Productivity.

126-64. Commission's authority to administer incentive pay program for State employees.

126-65. Application for incentive awards.

126-66. Qualifications.

126-67. Awards.

126-68. Annual report.

Article 1.

State Personnel System Established.

§ 126-3. (Effective July 1, 1985) Office of State Personnel established; administration and supervision; appointment, compensation and tenure of Director.

There is hereby established the Office of State Personnel (hereinafter referred to as "the Office") which shall be placed for organizational purposes within the Department of Administration. Notwithstanding the provisions of North Carolina State government reorganization as of January 1, 1975, and specifically notwithstanding the provisions of Chapter 864 of the 1971 North Carolina Session Laws [Chapter 143A], the Office of State Personnel shall exercise all of its statutory powers in this Chapter independent of control by the Secretary of Administration and shall be under the administration and supervision of a State Personnel Director (hereinafter referred to as "the Director") appointed by the Governor and subject to the supervision of the Commission for purposes of this Chapter. The salary of the Director shall be fixed by the General Assembly in the Current Operations Appropriations Act. The Director shall serve at the pleasure of the Governor. (1965, c. 640, s. 2; 1975, c. 667, s. 5; 1983, c. 717, s. 40; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act at the end of this section.

§ 126-5. Employees subject to Chapter; exemptions.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 33, effective July 1, 1984, added a new subsection (c1) to this section. However, Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 96, repealed Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 33, also effective July 1, 1984. Subsection (c1), therefore, never went into effect.

Article 2.

Salaries and Leave of State Employees.

§ 126-7. Performance salary increases for State employees.

Cross References. — For provision that the provisions of this section shall not apply to members of the State Highway Patrol, see § 20-187.3(a).

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 219, provides:

"Notwithstanding the provisions of Section 19.1 of Chapter 1137 of the 1979 Session Laws as amended by Chapter 1053 of the 1981 Session Laws, G.S. 115C-12(9)a, G.S. 126-7, or any other provision of law, no employee or officer of the public school system shall receive an automatic increment, and no State employee or officer shall receive a merit increment during the 1984-85 fiscal year, except as otherwise permitted by this act. This section expires June 30, 1985.

"The General Assembly recognizes that because of budget constraints, automatic increments and annual increments have been frozen since July 1, 1982. If the State is to attract and retain qualified teachers and State employees, it is imperative that automatic increments and annual increments be reinstated as soon as possible. Therefore, the General Assembly requests that the Governor and the Advisory Budget Commission give the reinstatement of the annual increments and merit increments and the addition of the tenth step in the State employees salary plan the highest priority when they prepare a budget for the 1985-87 fiscal biennium."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 126-8.2. Replacement of law-enforcement officer on final sick leave.

When a sworn law-enforcement officer employed by the State is on sick leave, and the head of the department employing the officer has obtained a certification from a physician that the officer will not recover and return to duty, a replacement for the officer may be hired even though the resulting number of employees in the department exceeds the number for which an appropriation was made in the Current Operations Appropriations Act, if sufficient funds are available from appropriations to the department for salaries to pay the salary of both the new employee and the officer on sick leave until the officer's accumulated leave is exhausted or his employment is terminated. (1983 (Reg. Sess., 1984), c. 1034, s. 105.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Article 6.

Equal Employment Opportunity; Assisting in Obtaining State Employment.

§ 126-16. (Effective July 1, 1986) Equal opportunity for employment and compensation by State departments and agencies and local political subdivisions.

All State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or physical disability to all persons otherwise qualified, except where specific age, sex or physical requirements constitute bona fide occupational qualifications necessary to proper and efficient administration. This section with respect to equal opportunity as to age shall be limited to individuals who are at least 40 years of age but less than 70 years of age. (1971, c. 823; 1975, c. 158; 1977, c. 866, s. 7; 1979, c. 862, s. 3; 1983 (Reg. Sess., 1984), c. 1116, s. 111.)

For this section as in effect until July 1, 1986, see the Replacement Volume.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1986, inserted "and compensation" near the beginning of the first sentence.

At the direction of the Revisor of Statutes, the catchline has been revised to reflect the amendment.

Article 8.

Employee Appeals of Grievances and Disciplinary Action.

§ 126-35. Written statement of reason for disciplinary action.

CASE NOTES

Stated in Burwell v. Griffin, — N.C. App. —, 312 S.E.2d 917 (1984).

Article 11.

Governor's Commission on Governmental Productivity.

§ 126-64. Commission's authority to administer incentive pay program for State employees.

The Governor's Commission on Governmental Productivity is authorized, in addition to other powers and functions assigned to it by the Governor, to adopt policies and procedures to establish and administer an incentive pay program for State employees. The Commission shall consist of not more than 21 members, all of whom shall be appointed by the Governor. (1979, c. 945, s. 2; 1981

(Reg. Sess., 1982), c. 1191, s. 39; 1983, c. 871, s. 1; c. 913, s. 22; 1983 (Reg. Sess., 1984), c. 995, s. 19.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, rewrote this section, which formerly created the Committee for Incentive Pay for State Employees. The amendment also rewrote the heading to Article 11.

§ 126-65. Application for incentive awards.

With the exception of agencies and offices within the General Assembly, the Governor's Office, the Lieutenant Governor's Office, and the Department of the State Auditor, any agency or office of State government (i) having an identifiable self-contained budget, or (ii) having its financial records maintained according to an accounting system which identifies to the satisfaction of the State Auditor the expenditures and receipts properly attributable to that agency or office may make application to the Commission for selection as a candidate for the award of incentive pay to its employees. Such application must be submitted at least three months prior to the beginning of any fiscal year and must have the approval of the head of the State department within which the unit is located.

Applications shall be in the format specified by the Commission and shall contain such information as it may require, including but not limited to those evaluation components developed by the applying agency or office which will provide quantitative measures of program output and performance.

The Commission shall evaluate the applications submitted. From those proposals which are considered to be reasonable and practical, and which are found to include developed performance indicators which lend themselves to a judgment of success or failure, the Commission shall select the agencies and offices to participate in the incentive pay program for the fiscal year. (1979, c. 945, s. 2; 1983, c. 871, s. 1; 1983 (Reg. Sess., 1984), c. 995, s. 19.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, substituted reference to the "Commission" for reference to the "committee" in this section.

§ 126-66. Qualifications.

(a) To qualify for the award of incentive pay to its employees, an agency or office selected must demonstrate to the satisfaction of the Commission that it has met both of the following two criteria in its operations during the fiscal year, after adjustment for inflation or deflation:

(1) Operated at a lower "unit cost." Unit cost shall be defined as expenditures in dollars to complete a measurable unit of work.

a. For first time participants the unit cost for the participating year shall be compared to either the unit cost for the immediately preceding fiscal year or a standard unit cost approved by the Commission.

b. For participants with one or more years in the program, the unit cost for the participating year shall be compared to either the average unit cost of prior successful participating years in the program or a standard unit cost approved by the Commission; and

(2) Operated at no greater total dollar expenditures, except:

a. In a case where unit cost(s) are reduced but total expenditures increase due to the agency or office maintaining its level of service; or

b. In a case where the legislature or department head specifically mandates an increase in the workload.

(b) The Commission shall satisfy itself that the claimed unit dollar cost of operation is real and not merely apparent, and that it is not, in whole or in part, the result of:

(1) A lowering of the level or quality of the service rendered;
(2) Reduced pass-through on transfer expenditures;
(3) Receipts realized in excess of amounts budgeted;
(4) Nonrecurrence of expenditures which were single outlay, or one-time expenditures, in the preceding fiscal year;
(5) Failure to reward deserving employees through promotions, reclassification, award of merit salary increments, or salary increases authorized by salary range revisions;
(6) Postponement of normal purchases and repairs to a future fiscal year;
(7) Stockpiling inventories in the immediately preceding fiscal year so as to reduce requirements in the eligible fiscal year;
(8) Substitution of federal funds, other receipts, or non-State funds for State appropriations;
(9) Unreasonable postponement of payments of accounts payable until the fiscal year immediately following the eligible fiscal year;
(10) Shifting of expenses to another agency or office of government;
(11) Any other practice, event, or device which the Commission decides has caused a distortion which misrepresents that a savings or increase in level of services has occurred.

(c) Conversely, the Commission may consider, but is not limited to considering, as legitimate savings those reductions in expenditures made possible by such items as the following:

(1) Reductions in overtime;
(2) Elimination of consultant fees;
(3) Less temporary help;
(4) Elimination of budgeted positions;
(5) Improved methods of communication;
(6) Improved systems and procedures;
(7) Better development and utilization of manpower;
(8) Elimination of unnecessary travel;
(9) Elimination of unnecessary printing and mailing;
(10) Elimination of unnecessary payments for advertising, memberships, dues, subscriptions, etc.;
(11) Elimination of waste, duplication, and operations of doubtful value;
(12) Improved space utilization;
(13) Proven cost reduction techniques;
(14) Any other items considered by the Commission as representing true savings. (1979, c. 945, s. 2; 1983, c. 871, s. 1; 1983 (Reg. Sess., 1984), c. 995, s. 19.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, substituted reference to the "Commission" for reference to the "committee" in this section.

§ 126-67. Awards.

At the conclusion of the eligible fiscal year, the Commission shall compare the unit dollar expenditures for that year of each agency or office selected against the base year(s) data and, after making such adjustments as in its judgment are required to eliminate distortions, shall determine the amount, if any, that the agency or office has reduced its unit dollar cost of operations or

increased its level of services in the eligible fiscal year. Adjustments to eliminate distortions may include any legislative increases in employee compensation and inflationary increases in the cost of services, materials and supplies. If the Commission shall also determine that in its judgment an agency or office qualifies for award, it is hereby authorized to award, after consultation with the Advisory Budget Committee, to the employees of that agency or office a sum not in excess of twenty-five percent (25%) of the amount determined to be the total unit dollar savings to the State for the level of services rendered. Incentive pay awards provided under this Chapter shall be exempt from retirement contributions and shall not be included for the purpose of computing a retirement allowance under any public retirement system of this State. The amount awarded shall be divided and distributed in equal shares to the employees of the agency or office except that employees who worked for that unit less than the full 12 months of the fiscal year shall receive only a pro rata share based on the fraction of the year to the day worked for that agency or office. Employees leaving voluntarily to work outside of State government, or employees dismissed for cause will forfeit their share. Funds for this incentive pay shall be drawn from the agency's or office's principal department's ending balance for the eligible fiscal year. (1979, c. 945, s. 2; 1983, c. 717, s. 43; c. 871, s. 1; 1983 (Reg. Sess., 1984), c. 995, s. 19.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, substituted reference to the "Commission" for reference to the "committee" in this section.

§ 126-68. Annual report.

The Secretary of Administration shall cause to be prepared and submitted to the General Assembly a comprehensive annual status report on the Commission's activities, decisions, awards, and recommendations with respect to the employee incentive pay program. (1979, c. 945, s. 2; 1983, c. 871, s. 1; 1983 (Reg. Sess., 1984), c. 995, s. 19.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, substituted reference to the "Commission" for reference to the "committee" in this section.

Chapter 127A.

Militia.

Article 15.

North Carolina National Guard Tuition Assistance Act of 1975.

Sec.
127A-193. Benefit.

Article 3.

National Guard.

§ 127A-40. Pensions for the members of the North Carolina national guard.

OPINIONS OF ATTORNEY GENERAL

Prerequisites to Receipt of Pension. — A member of the North Carolina National Guard may receive the pension authorized by this section only after he meets the statutory age and length of service requirements and separates from the Guard with an honorable discharge. See opinion of Attorney General to Mr. Robert A. Melott, Deputy Secretary, Department of Crime Control and Public Safety, 52 N.C.A.G. 118 (1983).

Article 15.

North Carolina National Guard Tuition Assistance Act of 1975.

§ 127A-193. Benefit.

The benefit provided under this Article shall consist of a monetary educational assistance grant not to exceed five hundred dollars ($500.00) per academic year to qualifying members of the North Carolina national guard. Benefits shall be payable for a period of one academic year at a time, renewable at the option of the Secretary for a maximum of two thousand dollars ($2,000). (1975, c. 917, s. 5; 1977, c. 228, s. 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 99, 100.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "monetary educational assistance grant" for "monetary tuition assistance grant" and "maximum of two thousand dollars ($2,000)" for "maximum of four academic years."

Chapter 128.

Offices and Public Officers.

Article 3.

Retirement System for Counties, Cities and Towns.

Sec.

128-24. (Effective September 1, 1985) Membership.

Sec.

128-26. Allowance for service.

128-27. Benefits.

Article 1.

General Provisions.

§ 128-1.1. Dual-office holding allowed.

OPINIONS OF ATTORNEY GENERAL

Serving as President of the board of directors of a telephone membership corporation and on the Board of the Rural Electrification Authority is not prohibited dual office holding. See opinion of Attorney General to Mr. Aaron A. Hathcock, Administrator, Rural Electrification Authority, 52 N.C.A.G. 107 (1983).

Article 2.

Removal of Unfit Officers.

§ 128-16. Officers subject to removal; for what offenses.

CASE NOTES

The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to this article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Actions under this article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

Hearing Required. — Because of the severe adverse consequences possible for the office holder in an action under this article, fundamental fairness entitles such office holder to a hearing which meets the basic requirements of due process, requirements which must include adequate time and opportunity to prepare to respond to the accusations against him. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Although this article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

§ 128-17. Petition for removal; county attorney to prosecute.

CASE NOTES

The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to this article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Actions under this article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

Although this article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

§ 128-18. Petition filed with clerk; what it shall contain; answer.

CASE NOTES

The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to this article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Actions under this article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

Although this article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

§ 128-19. Suspension pending hearing; how vacancy filled.

CASE NOTES

The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to this article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Actions under this article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

Hearing Required. — Because of the severe adverse consequences possible for the office holder in an action under this article, fundamental fairness entitles such office holder to a hearing which meets the basic requirements of due process, requirements which must include adequate time and opportunity to prepare to respond to the accusations against him. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Although this article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

§ 128-20. Precedence on calendar; costs.

CASE NOTES

The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to this article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Actions under this article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

The purpose of this section is to ensure that charges of misconduct will be resolved as quickly as possible, minimizing the risk of loss of public confidence in law enforcement. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Although this article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 492, 309 S.E.2d 726 (1983).

Article 3.

Retirement System for Counties, Cities and Towns.

§ 128-24. (Effective September 1, 1985) Membership.

The membership of this Retirement System shall be composed as follows:

(1) All employees entering or reentering the service of a participating county, city, or town after the date of participation in the Retirement System of such county, city, or town, except that law-enforcement officers, as defined in subsection (m) of G.S. 143-166, may elect to become members of the Law-Enforcement Officers' Benefit and Retirement Fund or the North Carolina Local Governmental Employees' Retirement System. On and after July 1, 1965, new extension service employees in the employ of a county participating in the Local Governmental Employees' Retirement System are hereby excluded from participation in the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county; provided that on and after July 1, 1965, new extension service employees who are required to accept a federal Civil Service appointment may elect in writing on a form acceptable to the Retirement System, to be excluded from the Teachers' and State Employees' Retirement System and the local Retirement System.

(1a) Should any member in any period of eight consecutive years after becoming a member be absent from service more than seven years, or should he withdraw his accumulated contributions or should he become a beneficiary or die, he shall thereupon cease to be a member; provided that on and after July 1, 1971, a member shall cease to be a member only if he withdraws his accumulated contributions, or becomes a beneficiary, or dies.

(2) All persons who are employees of a participating county, city, or town except those who shall notify the Board of Trustees in writing, on or before 90 days following the date of participation in the Retirement System by such county, city or town: Provided, that persons who are or who shall become members of any existing retirement system and who are or who may be thereby entitled to benefit by existing laws providing for retirement allowances for employees wholly or partly at

the expense of funds drawn from the treasury of the State of North Carolina or of any political subdivision thereof, shall not be members: Provided, further, that employees of county social services and health departments whose compensation is derived from federal, State, and local funds may be members of the North Carolina Local Governmental Employees' Retirement System to the full extent of their compensation. Any member on or after July 1, 1969, may deposit in the annuity savings fund by a single payment the contributions plus interest which would have been credited to his account had he not signed a nonelection blank, and be entitled to such membership service credits and any prior service credits which became void upon execution of such nonelection blank; provided that the employer will pay the appropriate matching contributions.

(3) Effective January 1, 1955, there shall be three classes of members, to be designated Class A, Class B and Class C respectively. Each member who is an employee of a Class A employer shall be a Class A member; each member who is an employee of a Class B employer shall be a Class B member; and each member who is an employee of a Class C employer shall be a Class C member.

(3a) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1396, s. 1, effective July 1, 1982.

(4) The provisions of this subdivision (4) shall apply to any member whose retirement became effective prior to July 1, 1965, and became entitled to benefits hereunder in accordance with the provisions hereof. Such benefits shall be computed in accordance with the provisions of G.S. 128-27(b1) as in effect at the date of such separation from service.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the time he shall have attained the age of 60 years, or if a uniformed policeman or fireman prior to the time he shall have attained the age of 55 years, for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in the Retirement System, shall have the right to retire on a deferred retirement allowance upon the date he shall have attained the age of 60 years, or if a uniformed policeman or fireman upon the date he shall have attained the age of 55 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days next following the date of filing such application, he desires to be retired. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 128-27(b), paragraphs (1), (2) and (3).

b. In lieu of the benefits provided in paragraph a of this subdivision (4), any member who separates from service prior to the time he shall have attained the age of 60 years, or if a uniformed policeman or fireman prior to the time he shall have attained the age of 55 years, for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 30 or more years of creditable service, and who leaves his total accumulated contributions in the Retirement System, may elect to retire on an early retirement allowance; provided that such a member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days next following the date of filing such application, he desires to be retired; provided further that such applica-

tion shall be duly filed within 60 days following the date of such separation. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of age 60 years, or if a uniformed policeman or fireman at the attainment of age 55 years, upon proper application therefor.

c. Should an employee who retired on an early or service retirement allowance be restored to service prior to the time he shall have attained the age of 62 years, or if a uniformed policeman or fireman prior to the time he shall have attained the age of 55 years, his allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the uniform contribution rate for his class member. Upon his subsequent retirement, he shall be entitled to an allowance not less than the allowance described in 1 below reduced by the amount in 2 below.

1. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement, and his creditable service after he was restored to service.

2. The actuarial equivalent of the retirement benefits he previously received.

d. Should an employee who retired on an early or service retirement allowance be restored to service after the attainment of the age of 62 years, his retirement allowance shall be reduced to the extent necessary (if any) so that the sum of the retirement allowance at the time of retirement and earnings from employment by a unit of the Retirement System for any year (beginning January 1 and ending December 31) will not exceed the member's compensation received for the 12 months of service prior to retirement. Provided, however, that under no circumstances will the member's retirement allowance be reduced below the amount of his annuity as defined in G.S. 128-21(3).

(5) The provisions of this subdivision (5) shall apply to any member whose membership is terminated on or after July 1, 1965, and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 15 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; and further provided that in the case of a member who so separates from service on or after July 1, 1967, the aforestated requirement of 15 or more years of creditable service shall be reduced to 12 or more years of creditable service; and further provided that in the case of a member who so separates from service on or after July 1, 1971, or whose account is active on July 1, 1971, the aforestated requirement of 12 or more years of creditable service shall be reduced to

five or more years of creditable service. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 128-27(b1), provided that such benefits will be computed in accordance with subsection (b2) on or after July 1, 1967, but prior to July 1, 1969; and provided further that such benefits will be computed in accordance with subsection (b3) on or after July 1, 1969.

b. In lieu of the benefits provided in paragraph a of this subdivision, any member who separates from service prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System may elect to retire on an early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such early retirement allowance so elected shall be equal to the deferred retirement allowance otherwise payable at the attainment of the age of 60 years reduced by the percentage thereof indicated below.

Age at Retirement	*Percentage Reduction*
59	7
58	14
57	20
56	25
55	30
54	35
53	39
52	43
51	46
50	50

c. Should a beneficiary who retired on an early or service retirement allowance be reemployed by an employer participating in the Retirement System on a permanent full-time, part-time, temporary, or on fee-for-service basis, whether contractual or otherwise, the retirement allowance shall be suspended if the beneficiary receives or earns any of the following:

1. Salary or fees or both in excess of one thousand five hundred dollars ($1,500) per month;
2. Salary or fees or both in excess of thirteen thousand five hundred dollars ($13,500) during any consecutive 12 calendar months;
3. Salary or fees or both during any consecutive 12 calendar months, which is greater than fifty percent (50%) of the reported compensation during the 12 months of service preceding the effective date of retirement; or
4. Salary or fees or both during any month, which when added to the retirement allowance at retirement exceeds the monthly compensation earned immediately prior to retirement, if reemployed by the same employer within 90 days of the effective date of retirement.

The suspension of the retirement allowance shall be effective as of the first day of the month in which the beneficiary meets the

conditions set forth in conditions 1 or 4 of this paragraph and effective as of the first day of the next succeeding month following the month in which the beneficiary meets the conditions set forth in conditions 2 or 3 of this paragraph. The retirement allowance shall be reinstated the month following termination of reemployment or the month following the month in which the conditions set forth in this paragraph are no longer met. The Board of Trustees may adjust the monetary limits in this paragraph by an amount equivalent to any across-the-board salary increase granted to employees of the State by the General Assembly. Each employer shall report information monthly to the Board of Trustees on forms provided by the Board on each reemployed beneficiary sufficient for the effective enforcement of this paragraph. Notwithstanding the foregoing, any beneficiary may irrevocably elect to recommence membership in the Retirement System immediately upon being restored to service, whereupon the retirement allowance shall cease.

d. A beneficiary whose retirement allowance is suspended in accordance with the provisions of paragraph c and who is restored to service shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members.

Upon his subsequent retirement, he shall be paid a retirement allowance determined as follows:

1. For a member who earns at least three years' membership service after restoration to service, the retirement allowance shall be computed on the basis of his compensation and service before and after the period of prior retirement without restriction; provided, that if the prior allowance was based on a social security leveling payment option, the allowance shall be adjusted actuarially for the difference between the amount received under the optional payment and what would have been paid if the retirement allowance had been paid without optional modification.
2. For a member who does not earn three years' membership service after restoration to service, the retirement allowance shall be equal to the sum of the retirement allowance to which he would have been entitled had he not been restored to service, without modification of the election of an optional allowance previously made, and the retirement allowance that results from service earned since being restored to service; provided, that if the prior retirement allowance was based on a social security leveling payment option, the prior allowance shall be adjusted actuarially for the difference between the amount that would have been paid for each month had the payment not been suspended and what would have been paid if the retirement allowance had been paid without optional modification.

(6) Employees of a sending agency participating in an intergovernmental exchange of personnel under the provisions of Article 10 of Chapter 126 shall remain members entitled to all benefits of the System provided that the requirements of Article 10 of Chapter 126 are met; provided further, that a member may retain membership status while serving as an assigned employee or employee on leave under the provisions of Article 10 of Chapter 126 for purposes of receiving the death benefit regardless of whether he and his employer are

contributing to his account during the exchange period except that no duplicate benefits shall be paid. (1939, c. 390, s. 4; 1941, c. 357, s. 3; 1949, cc. 1011, 1013; 1951, c. 274, s. 2; 1955, c. 1153, s. 2; 1957, c. 854; 1959, c. 491, s. 4; 1961, c. 515, s. 1; 1965, c. 781; 1967, c. 978, ss. 1, 2; 1969, c. 442, ss. 1-5, 7; c. 982; 1971, c. 325, ss. 6-8; c. 326, ss. 1, 2; 1973, c. 243, s. 1; 1977, c. 783, s. 2; 1981, c. 979, s. 2; 1981 (Reg. Sess., 1982), c. 1396, ss. 1, 2; 1983, c. 556, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1106, ss. 1, 2.)

For this section as in effect until September 1, 1985, see the Replacement Volume and the 1983 Cumulative Supplement.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective September 1, 1985, and not applicable to agreements entered into before the effective date of the act, rewrote paragraphs (5)c and (5)d.

§ 128-26. Allowance for service.

(i) Notwithstanding any other provision of this Chapter, any person who withdrew his contributions in accordance with the provisions of G.S. 128-27(f) or 135-5(f) or the rules and regulations of the Law Enforcement Officers' Retirement System and who subsequently returns to service may, upon completion of 10 years of membership service, repay in a total lump sum any and all of the accumulated contributions previously withdrawn with sufficient interest added thereto to cover one half of the cost of providing such additional credit plus a fee to cover expense of handling which shall be determined by the Board of Trustees and receive credit for the service forfeited at time of withdrawal(s), provided that he left service prior to July 1, 1975. Any person who leaves service after June 30, 1975, and who withdraws his contributions in accordance with G.S. 128-27(f) or 135-5(f) or the rules and regulations of the Law Enforcement Officers' Retirement System and who subsequently returns to service may, upon completion of 10 years of membership service, repay in a total lump sum any and all of the accumulated contributions previously withdrawn with sufficient interest added thereto to cover the full cost of providing such additional credit plus a fee to cover expense of handling which shall be determined by the Board of Trustees and receive credit for the service forfeited at time of withdrawal(s). These provisions shall apply equally to retired members who had attained 10 years of membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of a member is made. The provisions of this subsection shall become effective for any employer only after an agreement to that effect has been executed by the employer and the Director of the Retirement System.

(1939, c. 390, s. 6; 1941, c. 357, s. 5; 1943, c. 535; 1945, c. 526, s. 3; 1951, c. 274, s. 3; 1955, c. 1153, s. 3; 1967, c. 978, ss. 11, 12; 1969, c. 442, s. 6; 1971, c. 325, ss. 9-11, 19; 1973, c. 243, s. 2; c. 667, s. 1; c. 816, s. 3; c. 1310, ss. 1-4; 1975, c. 205, s. 1; c. 485, ss. 1-3; 1977, c. 973; 1979, c. 866, s. 1; c. 868, ss. 1, 2; c. 1059, s. 1; 1981, c. 557, s. 3; 1981 (Reg. Sess., 1982), c. 1283, s. 1; c. 1396, s. 3; 1983, c. 533, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 231.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "Law Enforcement Officers' Retirement System" for "Law Enforcement Officers' Benefit and Retirement Fund" in the first sentence and inserted

"or the rules or regulations of the Law Enforcement Officers' Retirement System" in the second sentence.

§ 128-27. Benefits.

(a) Service Retirement Benefits. —

(1) Any member may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of 60 years and have at least five years of creditable service or shall have completed 30 years of creditable service, or if a uniformed policeman or fireman, he shall have attained the age of 55 years and have at least five years of creditable service.

(2) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1019, s. 1.

(3) Repealed by Session Laws 1971, c. 325, s. 12.

(4) Any member who was in service October 8, 1981, who had attained 60 years of age, may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired.

(f1) Notwithstanding the foregoing provisions, upon or after retirement any member who was a uniformed fireman, shall upon submission of an application, be paid the sum of accumulated contributions, with regular interest thereon, made under those provisions of G.S. 128-30(b)(1) that applied from July 1, 1965, through June 30, 1971, to the extent of the contributions required of the member that were in excess of the contributions required of other members of the Local Governmental Employees' Retirement System covered under the Social Security Act as was from time to time in effect; provided that, the return of contributions shall be payable only if the contributions did not increase the retirement allowance of the member under the provisions of this Chapter.

(*l*) Death Benefit Plan. — The provisions of this subsection shall become effective for any employer only after an agreement to that effect has been executed by the employer and the Director of the Retirement System. There is hereby created a Group Life Insurance Plan (hereinafter called the "Plan") which is established as an employee welfare benefit plan that is separate and apart from the Retirement System and under which the members of the Retirement System shall participate and be eligible for group life insurance benefits. Upon receipt of proof, satisfactory to the Board of Trustees in their capacity as trustees under the Group Life Insurance Plan, of the death, in service, of a member who had completed at least one full calendar year of membership in the Retirement System, there shall be paid to such person as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit. Such death benefit shall be equal to the greater of:

(1) The compensation on which contributions were made by the member during the calendar year preceding the year in which his death occurs, or

(2) The greatest compensation on which contributions were made by the member during a 12-month period of service within the 24-month period of service ending on the last day of the month preceding the month in which his last day of actual service occurs;

(3) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1049, s. 2. subject to a maximum of twenty thousand dollars ($20,000). Such death benefit shall be payable apart and separate from the payment of the member's accumulated contributions under the System on his death pursuant to the provisions of subsection (f) of this section. For the purpose of the Plan, a member shall be deemed to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service.

The death benefit provided in this subsection shall not be payable, notwithstanding the member's compliance with all the conditions set forth in the preceding paragraph, if his death occurs

(1) After June 30, 1969 and after he has attained age 70; or
(2) After December 31, 1969 and after he has attained age 69; or
(3) After December 31, 1970 and after he has attained age 68; or
(4) After December 31, 1971 and after he has attained age 67; or
(5) After December 31, 1972 and after he has attained age 66; or
(6) After December 31, 1973 and after he has attained age 65; or
(7) After December 31, 1978 and after he has attained age 70.

Notwithstanding the above provisions, the death benefit shall be payable on account of the death of any member who died or dies on or after January 1, 1974, but before January 1, 1979, after attaining age 65, if he or she had not yet attained age 65, if he or she had not yet attained age 66, was at the time of death completing the work year for those individuals under specific contract, or during the fiscal year for those individuals not under specific contract, in which he or she attained 65, and otherwise met all conditions for payment of the death benefit.

Notwithstanding the above provisions, the Board of Trustees may and is specifically authorized to provide the death benefit according to the terms and conditions otherwise appearing in this Plan in the form of group life insurance, either (i) by purchasing a contract or contracts of group life insurance with any life insurance company or companies licensed and authorized to transact business in this State for the purpose of insuring the lives of members in service, or (ii) by establishing a separate trust fund qualified under section 501(c)(9) of the Internal Revenue Code of 1954, as amended, for such purpose. To that end the Board of Trustees is authorized, empowered and directed to investigate the desirability of utilizing group life insurance by either of the foregoing methods for the purpose of providing the death benefit. If a separate trust fund is established, it shall be operated in accordance with rules and regulations adopted by the Board of Trustees and all investment earnings on the trust fund shall be credited to such fund.

In administration of the death benefit the following shall apply:

(1) For the purpose of determining eligibility only, in this subsection "calendar year" shall mean any period of 12 consecutive months. For all other purposes in this subsection "calendar year" shall mean the 12 months beginning January 1 and ending December 31.
(2) Last day of actual service shall be:
    a. When employment has been terminated, the last day the member actually worked.
    b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire.
(3) For a period when a member is on leave of absence, his status with respect to the death benefit will be determined by the provisions of G.S. 128-26(g).
(4) A member on leave of absence from his position as a local governmental employee for the purpose of serving as a member or officer of the General Assembly shall be deemed to be in service during sessions of the General Assembly and thereby covered by the provisions of the

death benefit, if applicable. The amount of the death benefit for such member shall be the equivalent of the salary to which the member would have been entitled as a local governmental employee during the 12-month period immediately prior to the month in which death occurred, not to exceed twenty thousand dollars ($20,000).

The provisions of the Retirement System pertaining to administration, G.S. 128-28, and management of funds, G.S. 128-29, are hereby made applicable to the Plan.

(z) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary as of July 1, 1983, which shall become payable on July 1, 1984, shall be three and eight-tenths percent (3.8%) as provided in G.S. 128-27(k) plus an additional four and two-tenths percent (4.2%) to a total of eight percent (8%). The provision of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary. The cost of these increases shall be borne from the funds of the Retirement System. (1939, c. 390, s. 7; 1945, c. 526, s. 4; 1951, c. 274, ss. 4-6; 1955, c. 1153, ss. 4-6; 1957, c. 855, ss. 1-4; 1959, c. 491, ss. 5-8; 1961, c. 515, ss. 2, 6, 7; 1965, c. 781; 1967, c. 978, ss. 3-7; 1969, c. 442, ss. 7-14; c. 898; 1971, c. 325, ss. 12-16, 19; c. 326, ss. 3-7; 1973, c. 243, ss. 3-7; c. 244, ss. 1-3; c. 816, s. 4; c. 994, ss. 2, 4; c. 1313, ss. 1, 2; 1975, c. 486, ss. 1, 2; c. 621, ss. 1, 2; 1975, 2nd Sess., c. 983, ss. 126-128; 1977, 2nd Sess., c. 1240; 1979, c. 862, ss. 2, 6, 7; c. 974, s. 1; c. 1063, s. 2; 1979, 2nd Sess., c. 1196, s. 2; cc. 1213, 1240; 1981, c. 672, s. 2; c. 689, s. 1; c. 940, s. 1; c. 975, s. 2; c. 978, ss. 3, 4; c. 980, ss. 1, 2; c. 981, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1284, ss. 1, 2; 1983, c. 467; c. 761, ss. 226, 227; 1983 (Reg. Sess., 1984), c. 1019, s. 1; c. 1044; c. 1049, ss. 1-3; c. 1086.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1049, s. 4, provides:

"No inchoate or pending right of any beneficiary in receipt of a disability retirement allowance from the Teachers' and State Employees', Local Governmental Employees', or Law Enforcement Officers' Retirement Systems, on the date of ratification of this act shall be diminished."

The act was ratified July 2, 1984.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1019, effective October 1, 1984, deleted subdivision (a)(2), relating to members in service who attain age 70.

The 1983 (Reg. Sess., 1984) amendment by c. 1044, effective June 29, 1984, added subsection (z).

The 1983 (Reg. Sess., 1984) amendment by c. 1049, effective January 1, 1984, in the first paragraph of subsection (*l*), rewrote subdivision (2), deleted subdivision (3), relating to any member who had applied for and was entitled to receive a disability reitrement allowance under the System, and rewrote the last sentence of that paragraph.

The 1983 (Reg. Sess., 1984) amendment by c. 1086, effective July 1, 1984, added subsection (f1).

Chapter 130.

Public Health.

Article 1.

General Provisions.

Sec.

130-1 to 130-3. [Repealed.]

Article 13B.

Solid Waste Management.

Sec.

130-166.21D. Construction.

Article 1.

General Provisions.

§§ 130-1 to 130-3: Repealed by Session Laws 1983, c. 891, s. 1, effective January 1, 1984.

Editor's Note. — Session Laws 1983, c. 891, s. 16, as set out in the Editor's Note in the 1983 Cumulative Supplement, should read:

"Sec. 16. This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

Article 13B.

Solid Waste Management.

§ 130-166.21D. Construction.

(b) The solid waste management program concerning hazardous waste maintained by the State under this Article shall be no more comprehensive than the hazardous waste program prescribed under the federal act. The rules and standards concerning hazardous waste promulgated under this Article shall be no more stringent than those rules, regulations and standards promulgated under the federal act; provided, that in establishing acceptable water table levels, location in relation to water supplies and population centers and appropriate buffer zones, the rules and standards promulgated under this Article shall be at least as comprehensive and may be more comprehensive than the hazardous waste program prescribed under the federal act. (1977, 2nd Sess., c. 1216; 1979, c. 464, s. 3; 1981, c. 704, s. 28.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only subsection (b) is set out.

Cross References. — For provision similar to subsection (a) of this section, see § 130A-305.

Editor's Note. —

Subsection (b) of this section is set out above as it was inadvertently omitted from the 1983 Cumulative Supplement.

Session Laws 1981, c. 704, ss. 1 and 2, provide:

"Section 1. Short title. This act may be referred to as the Waste Management Act of 1981.

"Sec. 2. Purpose. The purpose of this act is to provide for a comprehensive system for management of hazardous and low-level radioactive waste in North Carolina as

reflected in the 1981 Report of the Governor's Task Force on Waste Management."

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

Effect of Amendments. —

The 1981 amendment added the proviso at the end of the second sentence of subsection (b).

Chapter 130A.

Public Health.

Article 2.

Local Administration.

Part 1. Local Health Departments.

Sec.

130A-37. District board of health.
130A-40. Appointment of local health director.

Part. 2. Sanitary Districts.

130A-52.1. Action if 1983 election not held.
130A-53. Actions validated.
130A-55. Corporate powers.

Article 9.

Solid Waste Management.

130A-290. Definitions.
130A-293. Local ordinances prohibiting hazardous waste facilities invalid; petition to establish facility.
130A-294. Solid waste management program.
130A-295. Additional requirements for hazardous waste facilities.
130A-306. Hazardous Waste Site Remedial Fund.
130A-307 to 130A-310. [Reserved.]

Article 16.

Postmortem Investigation and Disposition.

Part 1. Postmortem Medicolegal Examinations and Services.

130A-391. Corneal tissue removal.

Article 1.

Definitions, General Provisions and Remedies.

Part 1. General Provisions.

§ 130A-5. Duties of the Secretary.

Editor's Note. —

Section Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, sets out legislative findings with regard to the children identified as a class in the case of Willie M., et al. vs. Hunt, et al. The section also indicates the legislative intent with regard to expenditure of funds appropriated for the class members and provides for a supplemental reserve fund to be allocated to local education agencies to serve class members. In addition, the section sets out reporting requirements and authorizes the Department of Human Resources to ensure the provision of appropriate services to class members where a local program is not providing appropriate services.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 76, provides that in addition to reports required by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, the Department of Human Resources and Public Education shall report periodically to the Commission on Children with Special Needs, as requested by the Commission, on operations of programs to benefit Willie M. class members.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

ARTICLE 2.

Local Administration.

Part 1. Local Health Departments.

§ 130A-37. District board of health.

(a) A district board of health shall be the policymaking, rule-making and adjudicatory body for a district health department and shall be composed of 15 members; provided, a district board of health may be increased up to a maximum number of 18 members by agreement of the boards of county commissioners in all counties that comprise the district. The agreement shall be evidenced by concurrent resolutions adopted by the affected boards of county commissioners.

(1957, c. 1357, s. 1; 1969, c. 719, s. 2; 1971, c. 175, s. 2; c. 940, s. 1; 1973, c. 143, ss. 1-4; c. 476, s. 128; 1975, c. 396, s. 1; 1981, c. 104; c. 238; c. 408; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 1077.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 3, 1984, added the proviso at the end of the first sentence of subsection (a) and the second sentence of that subsection.

§ 130A-40. Appointment of local health director.

A local board of health, after consulting with the appropriate county board or boards of commissioners, shall appoint a local health director. The State Personnel Commission, after consulting with the Commission for Health Services, shall establish qualifications for a local health director. The qualifications shall give equal emphasis to education and experience. However, a local health director shall not be required to be a physician. When a local board of health fails to appoint a local health director within 60 days of the creation of a vacancy, the State Health Director may appoint a local health director to serve until the local board of health appoints a local health director in accordance with this section. (1957, c. 1357, s. 1; 1973, c. 152; c. 476, s. 128; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 75.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted the present second and third sentences for a second sentence which read "A local health director shall possess the qualifications established for the position by the Commission for Health Services under G.S. 143D-142(a) and qualifications established for the position by the State Personnel Commission in accordance with Chapter 126 of the General Statutes."

Part 2. Sanitary Districts.

§ 130A-52.1. Action if 1983 election not held.

If any sanitary district held an election in 1982 under G.S. 130A-52, but failed to hold the 1983 election, then the persons elected in 1982 shall hold office until the terms that were to begin in 1983 have expired. (1983 (Reg. Sess., 1984), c. 1021, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1021, s. 3, makes this section effective July 1, 1984.

§ 130A-53. Actions validated.

Any action of a sanitary district taken prior to July 1, 1984, shall not be invalidated by failure to hold an election for members of the board. (1981 (Reg. Sess., 1982), c. 1271, s. 1; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 1021, s. 2.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "July 1, 1984" for "June 1, 1982."

§ 130A-55. Corporate powers.

A sanitary district board shall be a body politic and corporate and may sue and be sued in matters relating to the sanitary district. Notwithstanding any limitation in the petition under G.S. 130A-48, but subject to the provisions of G.S. 130A-55(17)e., each sanitary district may exercise all of the powers granted to sanitary districts by this Article. In addition, the sanitary district board shall have the following powers:

(16) To adopt rules for the promotion and protection of the public health and for these purposes to possess the following powers:

a. To require any person owning, occupying or controlling improved real property within the district to connect with either or both the water or sewage systems of the district when the local health director, having jurisdiction over the property, determines that the health of the people residing within the district will be endangered by a failure to connect.

b. To require any person owning, occupying or controlling improved real property within the district where the water or sewage systems of the district are not immediately available or it is impractical with the systems, to install sanitary toilets, septic tanks and other health equipment or installations in accordance with applicable statutes and rules.

c. To order a person to abate a public health nuisance of the district. If the person being ordered to abate the nuisance refuses to comply with the order, the sanitary district board may institute an action in the superior court of the county where the public health nuisance exists to enforce the order.

d. To abolish or regulate and control the use and occupancy of all pigsties and other animal stockyards or pens within the district and for an additional distance of 500 feet beyond the outer boundaries of the district, unless the 500 feet is within the corporate limits of a city or town.

e. Upon the noncompliance by a person of a rule adopted by the sanitary district board, the board shall notify the person of the rule being violated and the facts constituting the violation. The person shall have a reasonable time to comply with the rule as determined by the local health director of the person's residence. Upon failure to comply within the specified time or within a time extended by the sanitary district board, the person shall be guilty of a misdemeanor.

f. The sanitary district board is authorized to enforce the rules adopted pursuant to this Part by criminal action or civil action, including injunctive relief.

(22) To make special assessments against benefitted property within the corporate limits of the sanitary district and within the area served or to be served by the sanitary district for the purpose of constructing, reconstructing, extending, or otherwise improving water systems or sanitary collection, treatment, and sewage disposal systems, in the same manner that a county may make special assessments under authority of Article 9 of Chapter 153A of the General Statutes, except that the language appearing in G.S. 153A-185 reading as follows: "A county may not assess property within a city pursuant to subdivision (1) or (2) of this section unless the governing board of the city has by resolution approved the project," shall not apply to assessments levied by sanitary districts. For the purposes of this paragraph, references in Article 9 of Chapter 153A of the General Statutes, to the "county," the "board of county commissioners," "the board" or a specific county official or employee are deemed to refer respectively to the sanitary district and to the official or employee of the sanitary district who performs most nearly the same duties performed by the specified county official or employee.

Assessment rolls after being confirmed shall be filed for registration in the office of the Register of Deeds of the county in which the property being assessed is located, and the term "county tax collector" wherever used in G.S. 153A-195 and G.S. 153A-196, shall mean the officer designated by the sanitary district to perform the functions described in said sections of the statute. This subdivision applies only to sanitary districts with a population of 15,000 or over. (1927, c. 100, s. 7; 1933, c. 8, ss. 1, 2; 1935, c. 287, ss. 1, 2; 1941, c. 116; 1945, c. 651, ss. 1, 2; 1947, c. 476; 1949, c. 880, s. 1; cc. 1130, 1145; 1951, c. 17, s. 1; c. 1035, s. 1; 1957, c. 1357, s. 1; 1961, cc. 669, 865, 1155; 1963, c. 1232; 1965, c. 496, s. 1; 1967, c. 632; c. 637, s. 1; c. 798, s. 2; 1969, cc. 478, 700, 944; 1971, c. 780, s. 29; 1973, c. 476, s. 128; 1979, c. 520, s. 2; c. 619, s. 7; 1981, cc. 629, 655; c. 820, ss. 1-3; c. 898, ss. 1-4; 1981 (Reg. Sess., 1982), c. 1237; 1983, c. 891, s. 2; c. 925, s. 2.)

Editor's Note. — The introductory paragraph is set out above to correct an error in the internal reference. Subdivision (16) is set out to correct an error in paragraph (16) d. Subdivision (22) is set out to correct the indentation of the second paragraph.

Article 9.

Solid Waste Management.

§ 130A-290. Definitions.

The following definitions shall apply throughout this Article:

(1) "Comprehensive hazardous waste treatment facility" means a facility designated as such by the Governor's Waste Management Board, meeting the following criteria:

a. It is a commercial facility that accepts hazardous waste from the general public for treatment;

b. It has the capacity and capability to treat and dispose of hazardous waste on at least an intrastate regional basis; and

c. Its location will substantially facilitate treatment of hazardous waste for the State of North Carolina.

(1a) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste into or on any land so that the

solid waste or any constituent part of the solid waste may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(7a) "Hazardous waste long-term storage facility" means a facility as defined in G.S. 143B-470.2(5).

(8a) "Hazardous waste treatment facility" means a facility as defined in G.S. 143B-470.2(3).

(8b) "Landfill" means a disposal facility or part of a disposal facility where waste is placed in or on land and which is not a land treatment facility, a surface impoundment, an injection well, a hazardous waste long-term storage facility or a surface storage facility.

(8c) "Long-term retrievable storage" means storage in closed containers in facilities (either above or below ground) with (i) adequate lights, (ii) impervious cement floors, (iii) strong visible shelves or platforms, (iv) passageways to allow inspection at any time, (v) adequate ventilation if underground or in closed buildings, (vi) protection from the weather, (vii) accessible to monitoring with signs on both individual containers and sections of storage facilities, and (viii) adequate safety and security precautions for facility personnel, inspectors and invited or permitted members of the community.

(15a) "Reuse" means a process by which resources are reused or rendered usable.

(1969, c. 899; 1975, c. 311, s. 2; 1977, 2nd Sess., c. 1216; 1979, c. 464, s. 1; 1981, c. 704, s. 4; 1983, c. 795, ss. 1, 8.1; c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 26, 1984, added subdivisions (1), (7a), (8a), (8b), (8c) and (15a).

At the direction of the Revisor of Statutes, the definition of "Disposal," formerly designated as subdivision (1), has been redesignated (1a).

Legal Periodicals. — For comment on North Carolina's 1981 Waste Management Act, see 5 Camp. L. Rev. 337 (1983).

§ 130A-293. Local ordinances prohibiting hazardous waste facilities invalid; petition to establish facility.

(a) Notwithstanding any authority granted to counties, municipalities or other local authorities to adopt local ordinances, including those regulating land use, any local ordinance which prohibits or has the effect of prohibiting the establishment or operation of a hazardous waste facility or a hazardous waste landfill facility which the Governor's Waste Management Board has approved pursuant to subsections (b) and (c) of this section, shall be invalid only to the extent necessary to effectuate the purposes of this Article. For the purpose of this section, the Governor's Waste Management Board shall include, in addition to the members enumerated in G.S. 143B-216.12(a), two members appointed by the local governing body: (1) of the city in which the proposed site is located; or (2) of the county in which the proposed site is located (if the proposed site is outside city limits). The terms of the members appointed by the local governing body shall end upon the final determination made by the Governor under this section.

(b) When a hazardous waste facility would be prevented from construction or operation by a county, municipal or other local ordinance(s), the developer or operator of the facility or the Hazardous Waste Treatment Commission may petition the Governor's Waste Management Board to review the matter. After receipt of a petition, the Board shall hold a hearing in accordance with the

procedures in subsection (c) of this section and shall either approve or disapprove the establishment and operation of the facility. If the Board makes the four findings set forth below, the Board shall approve the establishment of the facility. If the Board does not make all of the four findings set forth below, the Board shall disapprove the establishment or operation of the facility. The decision of the Board shall be final unless a party to the action shall, pursuant to G.S. 7A-29, file a written appeal within 30 days of the date of the decision. The record on appeal shall include all materials and information submitted to or considered by the Board in accordance with subsection (c) of this section. The scope of judicial review shall be limited to questions of abuse of discretion. Before approving the facility, the Board must make the following findings:

(1) That the proposed facility is needed in order to establish adequate capability for the management of hazardous waste generated in this State and serves the interest of the citizens of the State as a whole;

(2) That all legally required State and federal permits or approvals have been issued by the appropriate State and federal agencies or that all State and federal permit requirements have been satisfied and that the permits or approvals have been denied or withheld only because of the local ordinance(s);

(3) That local citizens and elected officials have had adequate opportunity to participate in the siting process; and

(4) That the construction and operation of the facility will not pose an unreasonable health or environmental risk to the surrounding locality and that the facility developer or operator has taken or consented to take any reasonable measures to avoid or manage foreseeable risks and to comply to the maximum feasible extent with applicable ordinance(s).

The record for appeal shall include the Board's written decision, a complete transcript of the hearing, all written material presented to the Board regarding the site location and the specific findings required in this subsection and any minority positions on the recommendation and the specific findings required in this subsection. The Board's decision shall be in writing and shall identify the material submitted to the Board plus any additional materials used in arriving at the decision.

(c) When a petition as described in subsection (b) of this section has been filed with the Governor's Waste Management Board, the Board shall hold a public hearing to consider the petition. The hearing shall be held in the affected locality in accordance with Article 2 of Chapter 150A of the General Statutes within a reasonable time after receipt of the petition by the Board. The Board shall publish notice of the hearing twice a week for two successive weeks in a newspaper of general circulation in the county where the proposed site is located. The final notice shall appear at least 15 days, but not more than 25 days, before the hearing date. Any interested persons may appear before the Board at the hearing to offer testimony. In addition to testimony before the Board, an interested person may submit written material to the Board for its consideration. No later than 60 days after the hearing, the Board shall approve or disapprove the facility.

(1981, c. 704, s. 5; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, ss. 3-5.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 26, 1984, substituted "has" for "and the Governor have" preceding "approved pursuant to" near the end of the first sentence of subsection (a), rewrote subsection (b), and in subsection (c) deleted "present its written recommendation to the Governor to" preceding "approve or disapprove the facility" at the end of the present last sentence of the first paragraph and deleted the remainder of the subsection, relating to the Board's findings and written recommendation and the decision of the Governor.

§ 130A-294. Solid waste management program.

(a) The Department is authorized and directed to engage in research, conduct investigations and surveys, make inspections and establish a statewide solid waste management program. In establishing a program, the Department shall have authority to:

(1) Develop a comprehensive program for implementation of safe and sanitary practices for management of solid waste;

(2) Advise, consult, cooperate and contract with other State agencies, units of local government, the federal government, industries and individuals in the formulation and carrying out of a solid waste management program;

(3) Develop and adopt rules to establish standards for qualification as a waste "recycling, reduction or resource recovering facility" or as waste "recycling, reduction or resource recovering equipment" for the purpose of special tax classifications or treatment, and to certify as qualifying those applicants which meet the established standards. The standards shall be developed to qualify only those facilities and equipment exclusively used in the actual waste recycling, reduction or resource recovering process and shall exclude any incidental or supportive facilities and equipment;

(4) Develop a permit system governing the establishment and operation of solid waste management facilities. No permit shall be granted for a solid waste management facility having discharges which are point sources until the Department has referred the complete plans and specifications to the Environmental Management Commission and has received advice in writing that the plans and specifications are approved in accordance with the provisions of G.S. 143-215.1. In any case where the Department denies a permit for a solid waste management facility, it shall state in writing the reason for denial and shall also state its estimate of the changes in the applicant's proposed activities or plans which will be required for the applicant to obtain a permit.

The issuance of permits for sanitary landfills operated by local governments is exempt from the environmental impact statements required by Article 1 of Chapter 113A of the General Statutes, entitled the North Carolina Environmental Policy Act of 1971. All sanitary landfill permits issued to local governments prior to July 1, 1984, are hereby validated notwithstanding any failure to provide environmental impact statements pursuant to the North Carolina Environmental Policy Act of 1971;

(5) Repealed by Session Laws 1983, c. 795, s. 3.

(5a) Designate a geographic area within which the collection, transportation, storage and disposal of all solid waste generated within said area shall be accomplished in accordance with a solid waste management plan. Such designation may be made only after the Department has received a request from the unit or units of local government having jurisdiction within said geographic area that such designation be made and after receipt by the Department of a solid waste management plan which shall include:

a. The existing and projected population for such area;

b. The quantities of solid waste generated and estimated to be generated in such area;

c. The availability of sanitary landfill sites and the environmental impact of continued landfill of solid waste on surface and subsurface waters;

d. The method of solid waste disposal to be utilized and the energy or material which shall be recovered from the waste; and

e. Such other data that the Department may reasonably require.

(5b) Authorize units of local government to require by ordinance, that all solid waste generated within the designated geographic area that is placed in the waste stream for disposal be collected, transported, stored and disposed of at a permitted solid waste management facility or facilities serving such area. The provisions of such ordinance shall not be construed to prohibit the source separation of materials from solid waste prior to collection of such solid waste for disposal, or prohibit collectors of solid waste from recycling materials or limit access to such materials as an incident to collection of such solid waste; provided such prohibitions do not authorize the construction and operation of a resource recovery facility unless specifically permitted pursuant to an approved solid waste management plan. If a private solid waste landfill shall be substantially affected by such ordinance then the unit of local government adopting the ordinance shall be required to give the operator of the affected landfill at least two years written notice prior to the effective date of the proposed ordinance.

(5c) Except for the authority to designate a geographic area to be serviced by a solid waste management facility, delegate authority and responsibility to units of local government to perform all or a portion of a solid waste management program within the jurisdictional area of the unit of local government; provided that no authority over or control of the operations or properties of one local government shall be delegated to any other local government.

(5d) Require that an annual report of the implementation of the solid waste management plan within the designated geographic area be filed with the Department.

(6) The Department is authorized to charge and collect fees from operators of hazardous waste landfill facilities. The fees shall be used to establish a fund sufficient for each individual facility to defray the anticipated costs to the State for monitoring and care of the facility after the termination of the period during which the facility operator is required by applicable State and federal statutes, regulations or rules to remain responsible for post-closure monitoring and care. In establishing the fees, consideration shall be given to the size of the facility, the nature of the hazardous waste and the projected life of the facility.

(f) Within five days of receiving an application for a permit or for an amendment to an existing permit for a hazardous waste facility, the Department shall notify the clerk to the county board of commissioners or, if the facility is located within a city, the city clerk where the facility is proposed to be located. Prior to the issuance of a permit or an amendment of an existing permit for a hazardous waste facility, the Department shall issue public notice and conduct a public hearing in any county in which a hazardous waste facility is to be located. Notice and public hearings shall be in accordance with the appropriate federal regulations adopted pursuant to the federal act and with Chapter 150A of the General Statutes. Where the provisions of the federal regulations and Chapter 150A of the General Statutes are inconsistent, the federal regulations shall apply.

Within 180 days after receiving a complete application for a permit or for an amendment to an existing permit for a comprehensive hazardous waste treatment facility, the Department shall approve or disapprove the application. In acting upon the application, the Department shall consider land use, zoning, buffer zones, utility availability, proximity to sources of waste, civil defense, fire safety, transportation and access, existing road network, general con-

siderations of the public's health and safety, and any other objective factors reasonably related and relevant to the proper siting and operation of the comprehensive hazardous waste treatment facility. The Department may impose action responding to these factors as a condition in the permit. If the Department disapproves the application, the disapproval shall set forth specifically the reasons for the denial and the applicant shall have the right to appeal the disapproval.

(g) The Commission shall develop and adopt criteria and standards to be considered in location and permitting of a hazardous waste facility by January 31, 1985. The standards and criteria shall be developed through public participation, shall be enforced by the Department and shall include, in addition to all applicable State and federal rules and regulations, consideration of:

(1) Acceptability within the community where the facility is to be located or steps which should be taken if community acceptance is not forthcoming;

(2) Hydrological and geological factors such as flood plains, depth to water table, groundwater travel time, proximity to public water supply watersheds, soil pH, soil cation exchange capacity, soil composition and permeability, cavernous bedrock, seismic activity, slope, mines and climate;

(3) Natural resources such as wetlands, endangered species habitats, proximity to parks, forests, wilderness areas and historical sites, and air quality;

(4) Local land use whether residential, industrial, commercial, recreational, agricultural, and proximity to incompatible structures such as schools and airports;

(5) Transportation factors, such as proximity to waste generators and to population, route safety and method of transportation; and

(6) Aesthetic factors such as the visibility, appearance and noise level of the facility.

(h) Rules adopted by the Commission shall be subject to the following requirements:

(1) No hazardous waste landfill shall be established until at least one comprehensive hazardous waste treatment facility is fully operational in North Carolina.

(2) Hazardous waste shall be treated prior to disposal in North Carolina. Long-term storage or disposal shall be used for the storage or disposal of the residual or ashes of hazardous waste which has been treated so the toxicity is low enough to present no significant health or safety hazard in the event of leakage from the facility. Hazardous waste that cannot be reduced, stabilized or destroyed to the extent which renders it sufficiently low in toxicity as to present no significant health or safety hazard in the event of leakage shall be stored in long-term retrievable storage until such methods are found. Hazardous waste in long-term retrievable storage shall be detoxified as soon as the Commission for Health Services determines based upon a preponderance of the evidence that the technology is available at a reasonable cost. The Commission shall determine the extent of waste treatment required before hazardous waste can be disposed of in a hazardous waste landfill facility.

(3) Any hazardous waste landfill facility hereafter constructed in this State shall meet, at the minimum, the standards of construction imposed by federal regulations adopted under the Federal Act at the time the permit is issued.

(4) No hazardous waste landfill facility or polychlorinated biphenyl landfill facility shall be located within 25 miles of any other hazardous waste landfill facility or polychlorinated biphenyl landfill facility.

(5) No hazardous waste landfill facility or polychlorinated biphenyl landfill facility shall be permitted within 25 miles of a comprehensive hazardous waste treatment facility as defined in G.S. 130A-290(1).

(6) The following will not be disposed of in a hazardous waste landfill or long-term retrievable storage: ignitables as defined in the Federal Act, polyhalogenated biphenyls of 50 ppm or greater concentration and free liquids whether or not containerized.

(7) The underground storage of either a hazardous waste landfill or long-term storage facility shall have at a minimum the following: a leachate collection and removal system above an artificial impervious liner of at least 30 mils in thickness, a minimum of five feet of clay or clay-like liner with a maximum permeability of 1.0 x 10-7 centimeters per second (cm/sec) below said artificial liner, and a leachate detection system immediately below the clay or clay-like liner.

(8) Hazardous waste shall not be stored at a hazardous waste treatment facility for over 90 days prior to treatment or disposal.

(9) The Commission shall consider any hazardous waste treatment process proposed to it, if the process lessens treatment cost or improves treatment over then current methods or standards required by the Commission.

(i) The Department shall submit to the General Assembly by February 1, 1985, plans:

(1) To monitor and regulate all generators of more than 100 kilograms per month of hazardous waste; and

(2) To locate, catalogue and monitor all existing hazardous waste impoundments and surface impoundments, including inactive hazardous waste disposal sites and "orphan dumps", including those owned or operated by units of State and local government, and shall submit to the General Assembly by February 1, 1985, a plan to bring all of these under legal requirements in effect on February 1, 1985, including a timetable for compliance. This plan shall include recordation of each of these sites in the office of the Register of Deeds in the county where it is located. (1969, c. 899; 1973, c. 476, s. 128; 1975, c. 311, s. 4; c. 764, s. 1; 1977, c. 123; 1977, 2nd Sess., c. 1216; 1979, c. 464, s. 2; c. 694, s. 2; 1981, c. 704, s. 6; 1983, c. 795, ss. 3, 8.1; c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, ss. 6, 7; c. 1034, s. 73.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 973, effective June 26, 1984, added the second paragraph of subsection (f) and added new subsections (g) through (i).

The 1983 (Reg. Sess., 1984) amendment by c. 1034, effective July 1, 1984, added the second paragraph of subdivision (a)(4).

§ 130A-295. Additional requirements for hazardous waste facilities.

(a) An applicant for a permit for a hazardous waste facility shall satisfy the Department that:

(1) Any hazardous waste facility constructed or operated by the applicant, or any parent or subsidiary corporation if the applicant is a corporation, has been operated in accordance, with sound waste management practices and in substantial compliance with federal and State laws, regulations and rules; and

(2) The applicant, or any parent or subsidiary corporation if the applicant is a corporation, is financially qualified to operate the proposed hazardous waste facility.

(b) The operator shall deposit in trust with the city or county government one half of one percent (0.05%) of the income of the comprehensive hazardous waste treatment facility, payable within 30 days of each calendar quarter, until the total shall equal an amount of two hundred fifty thousand dollars ($250,000). As used herein, income means gross operating revenues less refunds, rebates and allowances. This fund shall be available to the city or county in which the comprehensive hazardous waste treatment facility is located for the purpose of defraying the cost of any cleanup which might be required at the comprehensive hazardous waste treatment facility. The city or county may, in its discretion, use up to fifty thousand dollars ($50,000) of this total to establish an Emergency Response Team, trained and equipped to handle hazardous waste spills and to respond to accidents at hazardous waste treatment facilities. Financial records shall be subject to the audit of the local government for two years after any fee is paid. Any errors in the payment shall be corrected by credit or debit in the next payment or payments by the operator of the hazardous waste facility. If the North Carolina Hazardous Waste Treatment Commission owns and operates the facility, the North Carolina Hazardous Waste Treatment Commission, consistent with the resources available, shall compensate the local government for expenses incurred due to location of the facility. This compensation shall not exceed the amount of ad valorem tax revenues the local government would have received if the facility were privately owned. Nothing herein shall be construed to limit in any way funds which might be available to local government from other sources.

(c) Although no one is required to use a comprehensive hazardous waste treatment facility, use by North Carolina industry shall be encouraged. Nothing in this act shall be construed to prevent any hazardous waste or other waste generated or located in North Carolina from being removed from the State for disposal, treatment or storage. (1981, c. 704, s. 7; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, s. 8.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 26, 1984, designated the first paragraph as subsection (a) added subsections (b) and (c).

§ 130A-306. Hazardous Waste Site Remedial Fund.

There is established under the control and direction of the Department, an Emergency Hazardous Site Remedial Fund which shall be a nonreverting fund consisting of any money appropriated for such purpose by the General Assembly or available to it from grants, fees, charges, and other money paid to or recovered by or on behalf of the Department pursuant to this Article, except fees specifically designated by this Article for some other use or purpose. The Fund shall be used to defray expenses incurred by the Department in developing and implementing an emergency hazardous waste remedial program and to reimburse any federal, State or local agency and any agent or contractor for expenses incurred in developing and implementing such a program that has been approved by the Department. These funds shall be used upon a determination that no funds or corrective action can be obtained from other sources without incurring a delay that would significantly increase the threat to life or risk of irreparable damage to the environment. In no event shall this Fund exceed two hundred thousand dollars ($200,000). The Secretary is authorized to take the necessary action to recover the abatement costs incurred by the State from the responsible party or parties. (1983 (Reg. Sess., 1984), c. 1034, s. 74.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§§ 130A-307 to 130A-310: Reserved for future codification purposes.

Article 16.

Postmortem Investigation and Disposition.

Part 1. Postmortem Medicolegal Examinations and Services.

§ 130A-391. Corneal tissue removal.

(a) A medical examiner or a regional pathologist may provide corneal tissue from a decedent under the jurisdiction of the medical examiner or the regional pathologist to the North Carolina Eye and Human Tissue Bank or other donee specified in G.S. 130A-405 under the following conditions:

(1) a. Consent from next-of-kin is obtained in accordance with G.S. 130A-404; or

b. and c. Repealed by Session Laws 1983 (Regular Session, 1984), c. 992, s. 1.

d. No objections are known to the medical examiner or regional pathologist; and

(2) The removal of the corneal tissue for transplant will not interfere with any subsequent course of investigation or autopsy or alter the postmortem facial appearance.

(1981, c. 782, s. 1; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 992, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, deleted paragraphs b and c of subdivision (a)(1) and added paragraph d of that subdivision.

Part 2. Autopsies.

§ 130A-398. Limitation on right to perform autopsy.

CASE NOTES

A cause of action exists in this State for wrongful autopsy. — The cause of action arises from a quasi-property right of the surviving next-of-kin to bury the dead without wrongful interference. Grad v. Kaasa, — N.C. App. —, 314 S.E.2d 755 (1984), decided under former §§ 130-198, 130-200.

But a Violation Will Not Automatically Result in Liability. — Athough the regulations and statutes limit a medical examiner's authority to order autopsies, a violation will not inevitably result in liability. A public official will be held liable only if it is shown that he acted entirely outside the scope of his authority or that his act, while inside his authority, was malicious or corrupt. Grad v. Kaasa, — N.C. App. —, 314 S.E.2d 755 (1984), decided under former §§ 130-198, 130-200.

When Medical Examiner Is Immune from Liability. — A medical examiner acts outside his authority if he subjectively determines that an autopsy is not authorized by statute, yet proceeds anyway, or if he fails to make any subjective determination at all concerning whether an autopsy would serve the public interest before proceeding. Conversely, where a medical examiner receives a death report under § 130-198 (see now § 130A-383) or 10 N.C.

Administrative Code § 11.0203, and then makes a subjective determination that an autopsy is advisable and in the public interest, his actions are within the scope of his authority and he is immune from liability unless his actions are motivated by malice or corruption. Grad v. Kaasa, — N.C. App. —, 314 S.E.2d 755 (1984), decided under former §§ 130-198, 130-200.

Chapter 131C.

Charitable Solicitation Licensure Act.

§ 131C-1. Short title.

CASE NOTES

Constitutionality. — See Optimist Club v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982).

The Charitable Solicitation Licensure Act was enacted to protect the general public and to establish and enforce standards for the use and solicitation of charitable funds. Optimist Club v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982).

Chapter 131D.

Inspection and Licensing of Facilities.

Article 3.

Domiciliary Home Residents' Bill of Rights.

Sec.
131D-21. Declaration of residents' rights.

ARTICLE 3.

Domiciliary Home Residents' Bill of Rights.

§ 131D-21. Declaration of residents' rights.

Each facility shall treat its residents in accordance with the provisions of this Article. Every resident shall have the following rights:

(6) To have his or her personal and medical records kept confidential and not disclosed without the written consent of the individual or guardian, which consent shall specify to whom the disclosure may be made, except as required by applicable State or federal statute or regulation or by third party contract. It is not the intent of this section to prohibit access to medical records by the treating physician except when the individual objects in writing. Records may also be disclosed without the written consent of the individual to agencies, institutions or individuals which are providing emergency medical services to the individual. Disclosure of information shall be limited to that which is necessary to meet the emergency.

(1981, c. 923, s. 1; 1983, c. 824, s. 13; 1983 (Reg. Sess., 1984), c. 1076.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 3, 1984, rewrote subdivision (6), which read "To have his or her personal and medical records kept confidential and not disclosed if he or she objects in writing unless required by State or federal law or regulation."

Chapter 131E.

Health Care Facilities and Services.

Article 2.

Public Hospitals.

Part A. Municipal Hospitals.

Sec.

131E-8.1. Maintenance of Health Education Facilities.

131E-13. Lease or sale of hospital facilities to for-profit corporations by municipalities and hospital authorities.

131E-14. Lease or sale of hospital facilities to certain nonprofit corporations.

Part B. Hospital Authority.

131E-21. Conflict of interest.

Article 6.

Health Care Facility Licensure Act.

Part C. Home Health Agency Licensure Act.

131E-136. Definitions.

Part D. Ambulatory Surgical Facility Licensure.

131E-146. Definitions.

Article 9.

Certificate of Need.

Sec.

131E-176. Definitions.

131E-178. Activities requiring certificate of need.

131E-183. Review criteria.

131E-188. Administrative and judicial review.

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Article 10.

Hospice Licensure Act.

131E-200. Title; purpose.

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131E-202. Licensing.

131E-203. Coverage.

131E-204. Inspections.

131E-205. Adverse action on a license; appeal procedures.

131E-206. Injunction.

131E-207. Confidentiality.

Article 2.

Public Hospitals.

Part A. Municipal Hospitals.

§ 131E-8.1. Maintenance of Health Education Facilities.

(a) This section shall apply to all sales and leases of a hospital facility by a municipality or hospital authority where any portion of the facility was constructed with a capital grant from the Area Health Education Centers Program (AHEC).

(b) The municipality or hospital authority shall give specific notice of intent to sell or lease and of any public hearing to the Director of the local AHEC program and the Director of the AHEC Program at the University of North Carolina School of Medicine at Chapel Hill.

(c) The municipality or hospital authority may provide continued access to the identical or equivalent facilities suitable for continuation of AHEC activities, including all services being provided under the existing operating contract. In the case of a freestanding portion of the hospital facility, the municipality or hospital authority may convey all ownership rights in the facility to the local AHEC program without monetary consideration.

(d) No portion of this section shall be construed to alter rights or obligations of the operating contracts between the hospital facility and AHEC. (1983 Reg. Sess., 1984), c. 1056, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1056, s. 2, makes this section effective July 1, 1984.

§ 131E-13. Lease or sale of hospital facilities to for-profit corporations by municipalities and hospital authorities.

(a) A municipality or hospital authority as defined in G.S. 131E-16(14), may lease, sell, or convey any hospital facility, or part, to a corporation, foreign or domestic, authorized to do business in North Carolina, subject to these conditions, which shall be included in the lease, agreement of sale, or agreement of conveyance:

(1) The corporation shall continue to provide the same or similar clinical hospital services to its patients in medical-surgery, obstetrics, pediatrics, outpatient and emergency treatment, including emergency services for the indigent, that the hospital facility provided prior to the lease, sale, or conveyance. These services may be terminated only as prescribed by Certificate of Need Law prescribed in Article 9 of Chapter 131E of the General Statutes, or, if Certificate of Need Law is inapplicable, by review procedure designed to guarantee public participation pursuant to rules adopted by the Secretary of the Department of Human Resources.

(2) The corporation shall ensure that indigent care is available to the population of the municipality or area served by the hospital authority at levels related to need, as previously demonstrated and determined mutually by the municipality or hospital authority and the corporation.

(3) The corporation shall not enact financial admission policies that have the effect of denying essential medical services or treatment solely because of a patient's immediate inability to pay for the services or treatment.

(4) The corporation shall ensure that admission to and services of the facility are available to beneficiaries of governmental reimbursement programs (Medicaid/Medicare) without discrimination or preference because they are beneficiaries of those programs.

(5) The corporation shall prepare an annual report that shows compliance with the requirements of the lease, sale, or conveyance.

The corporation shall further agree that if it fails to substantially comply with these conditions, or if it fails to operate the facility as a community general hospital open to the general public and free of discrimination based on race, creed, color, sex, or national origin unless relieved of this responsibility by operation of law, or if the corporation dissolves without a successor corporation to carry out the terms and conditions of the lease, agreement of sale, or agreement of conveyance, all ownership or other rights in the hospital facility, including the building, land and equipment associated with the hospital, shall revert to the municipality or hospital authority or successor entity originally conveying the hospital; provided that any building, land, or equipment associated with the hospital facility that the corporation has constructed or acquired since the sale may revert only upon payment to the corporation of a sum equal to the cost less depreciation of the building, land, or equipment.

This section shall not apply to leases, sales, or conveyances of nonmedical services or commercial activities, including the gift shop, cafeteria, the flower shop, or to surplus hospital property that is not required in the delivery of necessary hospital services at the time of the lease, sale, or conveyance.

Neither G.S. 153A-176 nor Article 12 of Chapter 160A of the General Statutes shall apply to leases, sales or conveyances under this section.

(b) In the case of a sale or conveyance, if either general obligation bonds or revenue bonds issued for the benefit of the hospital to be conveyed are outstanding at the time of sale or conveyance, then the corporation shall agree to the following:

By the effective date of sale or conveyance, the corporation shall place into an escrow fund money or direct obligations of, or obligations the principal of and interest on which, are unconditionally guaranteed by the United States of America (as approved by the Local Government Commission), the principal of and interest on which, when due and payable, will provide sufficient money to pay the principal of and the interest and redemption premium, if any, on all bonds then outstanding to the maturity date or dates of such bonds or to the date or dates specified for the redemption thereof. The corporation shall furnish to the Local Government Commission such evidence as the Commission may require that the securities purchased will satisfy the requirements of this section. A hospital which has placed funds in escrow to retire outstanding general obligation or revenue bonds, as provided in this section, shall not be considered a public hospital, and G.S. 159-39(a)(3) shall be inapplicable to such hospitals.

No bonds, notes or other evidences of indebtedness shall be issued by a municipality or hospital authority to finance equipment for or the acquisition, extension, construction, reconstruction, improvement, enlargement, or betterment of any hospital facility if the facility has been sold or conveyed to a corporation, foreign or domestic, authorized to do business in North Carolina.

(c) In the case of a lease, the municipality or hospital authority shall determine the length of the lease. No lease executed under this section shall be deemed to convey a freehold interest. Any sublease or assignment of the lease shall be subject to the conditions prescribed by this section. If the term of the lease is more than 10 years, and either general obligation bonds or revenue bonds issued for the benefit of the hospital to be leased are outstanding at the time of the lease, then the corporation shall agree to the following:

By the effective date of the lease, the corporation shall place into an escrow fund money or direct obligations of, or obligations the principal of and interest on which, are unconditionally guaranteed by the United States of America (as approved by the Local Government Commission), the principal of and interest on which, when due and payable, will provide sufficient money to pay the principal of and the interest and redemption premium, if any, on all bonds then outstanding to the maturity date or dates of such bonds or to the date or dates specified for the redemption thereof. The corporation shall furnish to the Local Government Commission such evidence as the Commission may require that the securities purchased will satisfy the requirements of this section.

No bonds, notes or other evidences of indebtedness shall be issued by a municipality or hospital authority to finance equipment for or the acquisition, extension, construction, reconstruction, improvement, enlargement, or betterment of any hospital facility when the facility is leased to a corporation, foreign or domestic, authorized to do business in North Carolina.

(d) The municipality or hospital authority shall comply with the following procedures before leasing, selling, or conveying a hospital facility, or part thereof:

(1) The municipality or hospital authority shall first adopt a resolution declaring its intent to sell, lease, or convey the hospital facility at a regular meeting on 10 days' public notice. Notice shall be given by publication in one or more papers of general circulation in the affected area describing the intent to lease, sell, or convey the hospital facility involved, known potential buyers or lessees, a solicitation of addi-

tional interested buyers or lessees and intent to negotiate the terms of the lease or sale. Specific notice, given by certified mail, shall be given to the local office of each state-supported program that has made a capital expenditure in the hospital facility, to the Department of Human Resources, and to the Office of State Budget and Management.

(2) At the meeting to adopt a resolution of intent, the municipality or hospital authority shall request proposals for lease or purchase by direct solicitation of at least five prospective lessees or buyers. The solicitation shall include a copy of G.S. 131E-13.

(3) The municipality or hospital authority shall conduct a public hearing on the resolution of intent not less than 15 days after its adoption. Notice of the public hearing shall be given by publication at least 15 days before the hearing. All interested persons shall be heard at the public hearing.

(4) Before considering any proposal to lease or purchase, the municipality or hospital authority shall require information on charges, services, and indigent care at similar facilities owned or operated by the proposed lessee or buyer.

(5) Not less than 45 days after adopting a resolution of intent and not less than 30 days after conducting a public hearing on the resolution of intent, the municipality or hospital authority shall conduct a public hearing on proposals for lease or purchase that have been made. Notice of the public hearings shall be given by publication at least 10 days before the hearing. The notice shall state that copies of proposals for lease or purchase are available to the public.

(6) The municipality or hospital authority shall make copies of the proposals to lease or purchase available to the public at least 10 days before the public hearing on the proposals.

(7) Not less than 60 days after adopting a resolution of intent, the municipality or hospital authority at a regular meeting shall approve any lease, sale, or conveyance by a resolution. The municipality or hospital authority shall adopt this resolution only upon a finding that the lease, sale, or conveyance is in the public interest after considering whether the proposed lease, sale, or conveyance will meet the health-related needs of medically underserved groups, such as low income persons, racial and ethnic minorities, and handicapped persons. Notice of the regular meeting shall be given at least 10 days before the meeting and shall state that copies of the lease, sale, or conveyance proposed for approval are available.

(8) At least 10 days before the regular meeting at which any lease, sale, or conveyance is approved, the municipality or hospital authority shall make copies of the proposed contract available to the public. (1983 (Reg. Sess., 1984), c. 1066, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1066, s. 3, makes this section effective July 1, 1984, and only applicable to leases, sales, or conveyances made on or after that date.

§ 131E-14. Lease or sale of hospital facilities to certain nonprofit corporations.

If a municipality or hospital authority leases, sells, or conveys a hospital facility, or part, to a nonprofit corporation of which a majority of voting members of its governing body is not appointed or controlled by the municipality or hospital authority, the procedural requirements set forth in G.S. 131E-13(d) shall apply. (1983 (Reg. Sess., 1984), c. 1066, s. 2.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1066, s. 3, makes this section effective July 1, 1984, and only applicable to leases, sales, or conveyances made on or after that date.

Part B. Hospital Authority.

§ 131E-21. Conflict of interest.

No commissioner or employee of the hospital authority shall:

(1) Acquire any interest, direct or indirect, in any hospital facility or in any property included or planned to be included in a hospital facility; or

(2) Have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any hospital facility, except an employment contract for an employee. The foregoing restriction shall not apply to any contract, undertaking, or other transaction with a bank or banking institution, savings and loan association or public utility in the regular course of its business; Provided that any such contract, undertaking, or other transaction shall be authorized by the commissioners by specific resolution on which no commissioner having an interest, direct or indirect, shall vote.

The fact that a person owns ten percent (10%) or less stock of a corporation or has a ten percent (10%) or less ownership in any other business entity or is an employee of that corporation or other business entity does not make the person have an "interest, direct or indirect" as this phrase is used in subsections (1) and (2) of the section; provided that, in order for the exception to apply, the contract, undertaking or other transaction shall be authorized by the commissioners by specific resolution on which no commissioner or employee having an interest, direct or indirect, shall vote.

If a commissioner or employee of an authority owns or controls an interest, direct or indirect, in any property included or planned to be included in any hospital facility, the commissioner or employee shall immediately disclose the same in writing to the authority and the disclosure shall be entered upon the minutes of the authority. Failure to disclose shall constitute misconduct in office and shall be grounds for a commissioner's removal from office under G.S. 131E-22. (1943, c. 780, s. 7; 1971, c. 749; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1058, s. 1.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 2, 1984, inserted the present second paragraph.

Article 6.

Health Care Facility Licensure Act.

Part A. Nursing Home Licensure Act.

§ 131E-100. Title; purpose.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1001, repeals Session Laws 1981, c. 1127, s. 31, which is referred to in the Editor's note under this section in the 1983 Cumulative Supplement.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 80, provides:

"Notwithstanding any plans or rules of the

Department of Human Resources to the contrary, a certificate of need may be granted for skilled or intermediate care facilities in a county in which a county-owned licensed skilled nursing facility or intermediate care facility has been closed, demolished, or destroyed, in whole or in part, on or before January 1, 1983, but only to the extent that licensed beds were taken out of use as a result of the closure, demolition, or destruction of a facility."

Part C. Home Health Agency Licensure Act.

§ 131E-136. Definitions.

As used in this Part, unless otherwise specified:

(1) "Commission" means the North Carolina Medical Care Commission.

(1971, c. 539, s. 1; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1022, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1022, s. 8, makes the act effective from November 1, 1984, through June 30, 1987.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment substituted "North Carolina Medical Care Commission" for "Commission for Health Services" in subdivision (1).

Part D. Ambulatory Surgical Facility Licensure.

§ 131E-146. Definitions.

As used in this Part, unless otherwise specified:

(1) "Ambulatory surgical facility" means a facility designed for the provision of an ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours and must provide at least one designated operating room and at least one designated recovery room, have available the necessary equipment and trained personnel to handle emergencies, provide adequate quality assurance and assessment by an evaluation and review committee, and maintain adequate medical records for each patient. An ambulatory surgical facility may be operated as a part of a physician or dentist's office, provided the facility is licensed under G.S. Chapter 131E, Article 6, Part D, but the performance of incidental, limited ambulatory surgical procedures which do not constitute an ambulatory surgical program as defined in subdivision (1a) and which are performed in a physician or dentist's office does not make that office an ambulatory surgical facility.

(1a) "Ambulatory surgical program" means a formal program for providing on a same-day basis those surgical procedures which require local, regional or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery, to be medically unnecessary.

(1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1064, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 2, 1984, rewrote subdivision (1) and inserted subdivision (1a).

ARTICLE 9.

Certificate of Need.

§ 131E-175. Findings of fact.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 999, provides: "Section 1. Notwithstanding the provisions of Article 9 of Chapter 131E of the General Statutes or of any other law, beginning on the effective date of this act, and until January 31, 1985, the Department of Human Resources shall not issue a certificate of need for:

"(1) Any new or additional home health agency; or

"(2) Any new or additional home health service.

This prohibition shall not apply to home health agencies and home health services for which completed applications, including the required fees, have been filed prior to July 1, 1984.

"Sec. 2. Any person who has applied for a certificate of need and who has not received one due to failure to complete the application and pay the fees shall not be required to file a new application with the Department of Human Resources in order for that proposal to be reviewed after January 31, 1985. That person may request the Department to review the application that already has been filed when complete. Nonetheless, the Department of Human Resources may adopt rules requiring an applicant to review the application and update it where appropriate."

Session Laws 1983 (Reg. Sess., 1984), c. 999, s. 3 makes the act effective upon ratification. The act was ratified June 27, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 80, provides:

"Notwithstanding any plans or rules of the Department of Human Resources to the contrary, a certificate of need may be granted for skilled or intermediate care facilities in a county in which a county-owned licensed skilled nursing facility or intermediate care facility has been closed, demolished, or destroyed, in whole or in part, on or before January 1, 1983, but only to the extent that licensed beds were taken out of use as a result of the closure, demolition, or destruction of a facility."

§ 131E-176. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Ambulatory surgical facility" means a facility designed for the provision of an ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours and must provide at least one designated operating room and at least one designated recovery room, have available the necessary equipment and trained personnel to handle emergencies, provide adequate quality assurance and assessment by an evaluation and review committee, and maintain adequate medical records for each patient. An ambulatory surgical facility may be operated as a part of a physician or dentist's office, provided the facility is licensed under G.S. Chapter 131E, Article 6, Part D, but the performance of incidental, limited ambulatory surgical procedures which do not constitute an ambulatory surgical program as defined in subdivision (1a) and which are performed in a physician or dentist's office does not make that office an ambulatory surgical facility.

(1a) "Ambulatory surgical program" means a formal program for providing on a same-day basis those surgical procedures which require local, regional or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery, to be medically unnecessary.

(5) "Change in bed capacity" means (i) any increase in the total number of beds, or (ii) any relocation of beds from one physical facility or site to another, or (iii) a decrease in the total number of beds when that decrease involves a capital expenditure exceeding the expenditure minimum as defined in subdivision (16)b of this section, or (iv) a redistribution of beds among different categories when that redistribution involves a capital expenditure exceeding the expenditure minimum as defined in subdivision (16)b of this section. For purposes of this subdivision "beds" means beds in hospitals, rehabilitation facilities, psychiatric facilities, chemical dependency treatment facilities, intermediate care facilities, skilled nursing facilities and intermediate care facilities for the mentally retarded.

(5a) "Chemical dependency treatment facility" means a public or private facility, or unit in a facility, which is engaged in providing 24-hour a day treatment for chemical dependency or substance abuse. This treatment may include detoxification, administration of a therapeutic regimen for the treatment of chemically dependent or substance abusing persons and related services. The facility or unit may be:

a. A unit within a general hospital or an attached or freestanding unit of a general hospital licensed under Article 5, Chapter 131E, of the General Statutes,

b. A unit within a psychiatric hospital or an attached or freestanding unit of a psychiatric hospital licensed under Article 1A, Chapter 122, of the General Statutes,

c. A freestanding facility specializing in treatment of persons who are substance abusers or chemically dependent licensed under Article 1A, Chapter 122, of the General Statutes;

and may be identified as "chemical dependency, substance abuse, alcoholism, or drug abuse treatment units," "residential chemical dependency, substance abuse, alcoholism or drug abuse facilities," "social setting detoxification facilities" and "medical detoxification facilities," or by other names if the purpose is to provide treatment of chemically dependent or substance abusing persons, but shall not include halfway houses or recovery farms.

(9) "Health care facilities" means hospitals; psychiatric facilities; skilled nursing facilities; kidney disease treatment centers, including freestanding hemodialysis units; intermediate care facilities, including intermediate care facilities for the mentally retarded or persons with related conditions; rehabilitation facilities; home health agencies; chemical dependency treatment facilities, and ambulatory surgical facilities.

(13) "Hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. The term includes all facilities licensed pursuant to G.S. 131E-77 of the General Statutes.

(13a) "Hospice" means any coordinated program of home care within provision for inpatient care for terminally ill patients and their families. This case is provided by a medically directed interdisciplinary team, directly or through an agreement under the direction of an identifiable hospice administration. A hospice program of care provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.

(14) "Intermediate care facility" means a public or private institution which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require health-related care and services above the level of room and board.

(14a) "Intermediate care facility for the mentally retarded" means facilities licensed pursuant to Chapter 122 of the General Statutes for the purpose of providing health and habilitative services based on the developmental model and principles of normalization for persons with mental retardation, autism, cerebral palsy, epilepsy or related conditions.

(16) "New institutional health services" means:

a. The construction, development, or other establishment of a new health care facility;

b. The obligation by or on behalf of a health care facility or a local health department established under Article 2 of Chapter 130A of the General Statutes of any capital expenditure, other than one to acquire an existing health care facility, which exceeds the expenditure minimum. Further, increases in approved capital expenditures, if they exceed the expenditure minimum, are also new institutional health services. The expenditure minimum is six hundred thousand dollars ($600,000) for the 12-month period beginning October 1, 1979. For each 12-month period thereafter the expenditure minimum shall be the figure in effect for the preceding 12-month period, adjusted to reflect the change in the preceding 12-month period in the Department of Commerce Composite Construction Cost Index. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds the expenditure minimum;

c. The obligation of a capital expenditure by or on behalf of a health care facility when it is associated with a change in bed capacity and within the limits set forth in G.S. 131E-176(5);

d. The obligation of any capital expenditure by or on behalf of a health care facility which is associated with the addition of a health service which was not offered by or on behalf of the facility within the previous 12 months or with the termination of a health service which was offered in or through the facility;

e. A change in a project which was subject to review under paragraphs a, b, c, or d of this subdivision and for which a certificate of need had been issued, if the change is proposed within one year after the project was completed. For the purposes of this paragraph, a change in a project is a change in bed capacity, the addition of a health service, or the termination of a health service, regardless of whether a capital expenditure is associated with the change;

f. The offering of a health service by or on behalf of a health care facility if the service was not offered by or on behalf of the health care facility in the previous 12 months and if the annual operating costs of the service equal or exceed the expenditure minimum. The expenditure minimum for annual operating costs is two hundred fifty thousand dollars ($250,000) for the 12-month period beginning October 1, 1979. For each 12-month period

thereafter the expenditure minimum shall be the figure in effect for the preceding 12-month period, adjusted to reflect the change in the preceding 12-month period in the Department of Commerce Composite Construction Cost Index;

g. The acquisition by any person of major medical equipment that will be owned by or located in a health care facility;

h. The acquisition by any person of major medical equipment not owned by or located in a health care facility if notice of the acquisition is not filed with the Department in accordance with rules promulgated by the Department, or the Department, within 30 days after receipt of the notice, finds that the equipment will be used to provide services to inpatients of a hospital, excluding use on a temporary basis in the case of a natural disaster, a major accident, or equipment failure;

i. The use, excluding use on a temporary basis in the case of a natural disaster, a major accident, or equipment failure, of major medical equipment which was acquired without a certificate of need, to treat inpatients of a hospital;

j. The obligation of a capital expenditure by any person to acquire an existing health care facility, if a notice of intent is not filed with the Department in accordance with rules promulgated by the Department, or the Department, within 30 days after receipt of the notice of intent, finds that there will be a change in bed capacity, the addition of a health service not offered by or on behalf of the facility within the previous 12 months, or the termination of a health service which was offered by or on behalf of the facility;

k. A change in bed capacity, the addition of a health service which was not offered by or on behalf of the facility within the previous 12 months, or the termination of a health service which was offered by or on behalf of the facility, in a health care facility which was acquired without a certificate of need, if such change occurs within one year of the acquisition;

l. Notwithstanding the provisions of G.S. 131E-176(16)h and j, the purchase, lease or acquisition of any of the following: any health care facility, or portion thereof; major medical equipment; a controlling interest in the health care facility, or portion thereof; or a controlling interest in major medical equipment. The aforesaid are new institutional health services if the asset was obtained under a certificate of need issued pursuant to G.S. 131E-180;

m. Any conversion of nonhealth care facility beds to health care facility beds, regardless of whether a capital expenditure is associated with the conversion. A bed is a nonhealth care facility bed if a facility that contained only that type of bed would not be a health care facility. A bed is a health care facility bed if a facility that contained only that type of bed would be a health care facility.

n. The construction, development, or other establishment of a hospice if the operating budget thereof is in excess of one hundred thousand dollars ($100,000) or if there is the obligation of any capital expenditure by or on behalf of the hospice as provided in G.S. 131E-176(16)b.

(21) "Psychiatric facility" means a public or private facility licensed pursuant to Chapter 122 of the General Statutes and which is primarily engaged in providing to inpatients, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons.

(22) "Rehabilitation facility" means a public or private inpatient or outpatient facility which is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical and other services which are provided under competent, professional supervision, and shall include "comprehensive outpatient rehabilitation facilities" as defined by the Social Security Act and the regulations promulgated by the Department of Health and Human Services pursuant to that act.

(26) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1002, s. 9.

(1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, ss. 1, 2; c. 1127, ss. 24-29; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1002, ss. 1-9; c. 1022, ss. 2, 3; c. 1064, s. 1; c. 1110, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1022, s. 8, makes the act effective from November 1, 1984, through June 30, 1987.

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 17, provides that the enactment of ss. 1 through 3 of the act (which amended §§ 131E-176 and 131E-178) shall not be construed as requiring a facility which had obtained prior to June 30, 1984, a certificate of need for such use under prior law to obtain a new certificate of need on account of the special inclusion of chemical dependency treatment facilities in Article 9 of Chapter 131E.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1002, effective June 27, 1984, rewrote subdivision (5), inserted "psychiatric facilities" in subdivision (9), rewrote the second sentence of subdivision (13), which read "Such term does include psychiatric hospitals as defined in subdivision (21) of this section, or tuberculosis hospitals, as defined in subdivision (27) of this section," deleted the second sentence of subdivision (14), which read "This term includes intermediate care facilities for the mentally retarded or persons with related conditions such as epilepsy, cerebral palsy or autism," inserted subdivision (14a), rewrote paragraph c of subdivision (16), which read "The obligation of any capital expenditure by or on behalf of any health care facility which is associated with a change in bed capacity," rewrote subdivision (21), which formerly defined the term "psychiatric hospital," inserted "or outpatient" and added the language beginning "and shall include 'comprehensive outpatient rehabilitation facilities' " in subdivision (22), and deleted former subdivision (26), which former defined the term "State Mental Health Plan."

The 1983 (Reg. Sess., 1984) amendment by c. 1022, effective from November 1, 1984, through June 30, 1987, inserted subdivision (13a) and added paragraph (n) of subdivision (16).

The 1983 (Reg. Sess., 1984) amendment by c. 1064, effective July 2, 1984, rewrote subdivision (1) and inserted subdivision (1a).

The 1983 (Reg. Sess., 1984) amendment by c. 1110, effective July 6, 1984, added subdivision (5a) and inserted "chemical dependency treatment facilities" in subdivision (9).

§ 131E-178. Activities requiring certificate of need.

(a) No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department. Provided that chemical dependency treatment facilities containing beds licensed as of June 30, 1984, shall not be required to obtain a certificate of need.

(1977, 2nd Sess., c. 1182, s. 2; 1979, c. 876, s. 2; 1981, c. 651, s. 3; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1110, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human

Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 17, provides that the enactment of ss. 1 through 3 of the act (which amended §§ 131E-176 and 131E-178) shall not be construed as requiring a facility which had obtained prior to June 30, 1984, a certificate of need for such use under prior law to obtain a new certificate of need on account of the special inclusion of chemical dependency treatment facilities in Article 9 of Chapter 131E.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added the second sentence of subsection (a).

§ 131E-183. Review criteria.

(a) The Department shall promulgate rules implementing criteria outlined in this subsection to determine whether an applicant is to be issued a certificate for the proposed project. Criteria so implemented are to be consistent with federal law and regulations and shall cover:

(1) The relationship of the proposed project to the State Medical Facilities Plan, [and] the State Health Plan.

(2) The relationship of services reviewed to the long-range development plan, if any, of the persons providing or proposing such services.

(3) The need that the population served or to be served by such services has for such services, and the extent to which all residents of the area, and in particular low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, are likely to have access to those services.

(3a) In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.

(4) The availability of less costly or more effective alternative methods of providing the services to be offered, expanded, reduced, relocated or eliminated.

(5) The immediate and long-term financial feasibility of the proposal, as well as the probable impact of the proposal on the costs of and charges for providing health services by the person proposing the service.

(6) The relationship of the services proposed to be provided to the existing health care system of the area in which such services are proposed to be provided.

(7) The availability of resources, including health manpower, management personnel, and funds for capital and operating needs, for the provision of the services proposed to be provided and the need for alternative uses of these resources as identified by the applicable health systems plan, annual implementation plan or State Health Plan.

(8) The relationship, including the organizational relationship, of the health services proposed to be provided to ancillary or support services.

(9) Special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the health service areas in which the entities are located or in adjacent health service areas. Such entities may include medical and other health professions schools, multidisciplinary clinics and specialty centers.

(10) The special needs and circumstances of HMOs. These needs and circumstances shall be limited to:

a. The needs of enrolled members and reasonably anticipated new members of the HMO for the health service to be provided by the organization; and

b. The availability of new health services from non-HMO providers or other HMOs in a reasonable and cost-effective manner which is consistent with the basic method of operation of the HMO. In assessing the availability of these health services from these providers, the Department shall consider only whether the services from these providers:

1. Would be available under a contract of at least five years' duration;

2. Would be available and conveniently accessible through physicians and other health professionals associated with the HMO;

3. Would cost no more than if the services were provided by the HMO; and

4. Would be available in a manner which is administratively feasible to the HMO.

(11) The special needs and circumstances of biomedical and behavioral research projects which are designed to meet a national need and for which local conditions offer special advantages.

(12) In the case of a construction project, the costs and methods of the proposed construction, including the costs and methods of energy provision, and the probable impact of the construction project reviewed on the costs of providing health services by the person proposing the construction project and on the costs and charges to the public of providing health services by other persons.

(13) The contribution of the proposed service in meeting the health-related needs of members of medically underserved groups, such as low income persons, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to health services, particularly those needs identified in the applicable health systems plan, annual implementation plan, and State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the Department shall consider:

a. The extent to which medically underserved populations currently use the applicant's proposed services in comparison to the percentage of the population in the applicant's service area which is medically underserved, and the extent to which medically underserved populations are expected to use the proposed services if approved;

b. The performance of the applicant in meeting its obligation, if any, under any applicable regulations requiring provision of uncompensated care, community service, or access by minorities and handicapped persons to programs receiving federal assistance, including the existence of any civil rights access complaints against the applicant;

c. The extent to which Medicare, Medicaid and medically indigent patients are served by the applicant; and

d. The extent to which the applicant offers a range of means by which a person will have access to its services. Examples of a range of means are outpatient services, admission by house staff, and admission by personal physicians.

(14) The effect of the means proposed for delivery of the health services on the clinical needs of health professional training programs in the area in which the services are to be provided.

(15) If the proposed health services are to be available in a limited number of facilities, the extent to which the health professions schools in the area will have access to the services for training purposes.

(16) The special circumstances of health care facilities with respect to the need for conserving energy.

(17) In accordance with Section 1502(b) of the Public Health Service Act, 42 U.S.C. 300k-2(b), the factors which influence the effect of competition on the supply of the health services being reviewed.

(18) Improvements or innovations in the financing and delivery of health services which foster competition, in accordance with Section 1502(b) of the Public Health Service Act, 42 U.S.C. 300k-2(b), and serve to promote quality assurance and cost effectiveness.

(19) In the case of proposed health services or facilities, the efficiency and appropriateness of the use of existing, similar services and facilities.

(20) In the case of existing services or facilities, the quality of care provided in the past.

(21) When an application is made by an osteopathic or allopathic facility for a certificate of need to construct, expand, or modernize a health care facility, acquire major medical equipment, or add services, the need for that construction, expansion, modernization, acquisition of equipment, or addition of services shall be considered on the bases of the need for and availability in the community of services and facilities for osteopathic and allopathic physicians and their patients. The Department shall consider the application in terms of its impact on existing and proposed institutional training programs for doctors of osteopathy and medicine at the student, internship, and residency training levels.

(1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 7; 1983, c. 775, s. 1; c. 920, s. 2; 1983 (Reg. Sess., 1984), c. 1002, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983, c. 920, s. 3, as amended by Session Laws 1983 (Reg. Sess., 1984), c. 1046, makes the act applicable only to facilities owned and operated by a nonprofit organization (including a corporation, association, or religious organization) with a membership of 5,000 or more, or by a corporation which is totally controlled by such an organization. Section 3 further provides that before such a facility obtaining a certificate of a need under the act may be operated other than as part of a "life care" or "care for life" institution, a certificate of need must be obtained without regard to subsection (c), and that no certificate of need may be granted under the act after June 30, 1984, except that a certificate may be granted under the act after that date if the application was in process and the Certificate of Need Section of the Division of Facilities Services had determined the application complete for review as of that date.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, deleted "and the State Mental Health Plan" at the end of subdivision (a)(1).

§ 131E-188. Administrative and judicial review.

(b) Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision of the Department shall be taken within 30 days of the receipt of the written

notice of decision required by G.S. 131E-187 and notice of appeal shall be filed with the Division of Facilities Services, Department of Human Resources and with all other affected persons who were parties to the contested hearing.

(1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 11; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1000, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1000, s. 4, provides that the act shall become effective October 1, 1984, but shall not affect any appeal for which notice of appeal was filed prior to the effective date of the act.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment rewrote subsection (b).

§ 131E-191. Venue.

(b) An action brought by a "party" as defined in G.S. 150A-2(5), except any "affected person" who was a party to a contested case hearing who must bring an action in the North Carolina Court of Appeals pursuant to G.S. 131E-188(b), who has exhausted all administrative remedies made available to that party by statute or rules and regulations, may be brought in the Superior Court of Wake County at any time after a final decision by the Department. Such action must be filed not later than 30 days after a written copy of the final decision by the Department is given by personal service or registered or certified mail to the person seeking judicial review. (1977, 2nd Sess., c. 1182, s. 2; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1000, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1000, s. 4, provides that the act shall become effective October 1, 1984, but shall not affect any appeal for which notice of appeal was filed prior to the effective date of the act.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment rewrote the first sentence of subsection (b).

Article 10.

Hospice Licensure Act.

§ 131E-200. Title; purpose.

This Article shall be known as the Hospice Licensure Act." The purpose of this Article is to establish licensing requirements for hospices. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1022, s. 8, makes this Article effective from November 1, 1984, through June 30, 1987.

§ 131E-201. Definitions.

As used in this Article, unless a different meaning or construction is clearly required by the context:

(1) "Commission" means the North Carolina Medical Care Commission.

(2) "Department" means the Department of Human Resources.

(3) "Hospice" means any coordinated program of home care with provision for inpatient care for terminally ill patients and their families. This care is provided by a medically directed interdisciplinary team,

directly or through an agreement under the direction of an identifiable hospice administration. A hospice program of care provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.

(4) "Hospice patient" means a patient diagnosed as terminally ill by a physician licensed to practice medicine in North Carolina, who the physician anticipates to have a life expectancy of weeks or months, generally not to exceed six months, and who alone, or in conjunction with designated family members, has voluntarily requested and been accepted into a licensed hospice program.

(5) "Hospice patient's family" means the hospice patient's immediate kin, including a spouse, brother, sister, child, or parent. Other relations and individuals with significant personal ties to the hospice patient may be designated as members of the hospice patient's family by mutual agreement among the hospice patient, the relation or individual and the hospice team.

(6) "Hospice team" or "Interdisciplinary team" means the following hospice personnel: physician licensed to practice medicine in North Carolina; nurse holding a valid, current license as required by North Carolina law; social worker; clergy member; and trained hospice volunteer. Other health care practitioners may be included on the team as the needs of the patient dictate or at the request of the physician. Other providers of special services may also be included as the needs of the patient dictate.

(7) "Identifiable hospice administration" means an administrative group, individual, or legal entity that has an identifiable organizational structure, accountable to a governing board directly or through a chief executive officer. This administration shall be responsible for the management of all aspects of the program.

(8) "Palliative care" means treatment directed at controlling pain, relieving other symptoms, and focusing on the special needs of the patient and family as they experience the stress of the dying process, rather than the treatment aimed at investigation and intervention for the purpose of cure or prolongation of life. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

§ 131E-202. Licensing.

(a) The Commission shall adopt rules for the licensing and regulation of hospices pursuant to this Article for the purpose of providing care, treatment, health, safety, welfare, and comfort of hospice patients. These rules shall include, but not be limited to:

(1) The qualifications and supervision of licensed and nonlicensed personnel;

(2) The provision and coordination of home and inpatient care, including the development of a written care plan;

(3) The management, operation, staffing, and equipping of the hospice program;

(4) Clinical and business records kept by the hospice; and

(5) Procedures for the review of utilization and quality of care.

(b) The Department shall provide applications for hospice licensure. Each application filed with the Department shall contain all information requested therein. A license shall be granted to the applicant upon determination by the Department that the applicant has complied with the provisions of this Article

and with the rules adopted by the Commission thereunder. Each license shall be issued only for the premises and persons named therein, shall not be transferable or assignable except with the written approval of the Department, and shall be posted in a conspicuous place on the licensed premises.

(c) The Department shall renew the license in accordance with this Article and with rules adopted thereunder. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1022, s. 7, provides: "Notwithstanding the effective date of this act, the Commission shall have the authority, as provided in G.S. 131E-202, to commence the rulemaking process as defined in G.S. 150A, the Administrative Procedure Act, upon ratification of this act." Section 8 of c. 1022 makes the act effective from November 1, 1984, through June 30, 1987.

§ 131E-203. Coverage.

(a) Except as provided in subsection (b), no person shall operate or represent himself to the public as operating a hospice without obtaining a license from the Department pursuant to this Article.

(b) Hospices administered by local health departments established under Article 2 of Chapter 130A of the General Statutes shall not be required to be licensed under this Article. Additionally, health care facilities and agencies licensed under Article 5 or 6 of Chapter 131E of the General Statutes shall not be required to be separately licensed under this Article. However, any facility or agency exempted from licensure as a hospice under this subsection shall be subject to rules adopted pursuant to this Article.

(c) Hospice care shall be available 24 hours a day, seven days a week. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

§ 131E-204. Inspections.

The Department shall inspect all hospices that are subject to rules adopted pursuant to this Article in order to determine compliance with the provisions of this Article and with rules adopted thereunder. Inspections shall be conducted in accordance with rules adopted by the Commission. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

§ 131E-205. Adverse action on a license; appeal procedures.

(a) The Department may suspend, revoke, cancel, or amend a license when there has been a substantial failure to comply with this Article or with rules and regulations adopted thereunder.

(b) Chapter 150A of the General Statutes, the Administrative Procedure Act, shall govern all administrative action pursuant to subsection (a) and all judicial review arising therefrom. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

§ 131E-206. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department may maintain an action in the name of the State for injunctive relief or other process against any person to restrain or prevent the establishment, conduct, management, or operation of a hospice without a license.

(b) Notwithstanding the provisions of G.S. 131E-203(b) or the existence of any other remedy, the Department may maintain an action in the name of the State for injunctive relief or other process against any person to restrain or prevent substantial noncompliance with this Article or the rules adopted thereunder.

(c) If any person shall hinder the proper performance of duty of the Department in carrying out the provisions of this Article, the Department may institute an action in the superior court of the county in which the hindrance occurred for injunctive relief against the continued hindrance. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

§ 131E-207. Confidentiality.

(a) Notwithstanding G.S. 8-53 or any other law relating to confidentiality of communications between physician and patient, in the course of an inspection conducted under G.S. 131E-204:

(1) Department representatives may review any writing or other record concerning the admission, discharge, medication, treatment, medical condition, or history of any person who is or has been a hospice patient; and

(2) Any person involved in treating a patient at or through a hospice may disclose information to a Department representative unless the patient objects in writing to review of his records or disclosure of the information. A hospice shall not release any information or allow any inspections under this section without first informing each affected patient in writing of his right to object to and thereby prohibit release of information or review of records pertaining to him.

A hospice, its employees and any other person interviewed in the course of an inspection shall be immune from liability for damages resulting from disclosure of any information to the Department.

(b) The Department shall not disclose:

(1) Any confidential or privileged information obtained under this section unless the patient or his legal representative authorizes disclosure in writing or unless a court of competent jurisdiction orders disclosure; or

(2) The name of anyone who has furnished information concerning a hospice without that person's consent.

The Department shall institute appropriate policies and procedures to ensure that unauthorized disclosure does not occur. Any Department employee who willfully discloses this information without appropriate authorization or court order shall be guilty of a misdemeanor and upon conviction fined at the discretion of the court but not to exceed five hundred dollars ($500.00).

(c) All confidential or privileged information obtained under this section and the names of persons providing this information shall be exempt from Chapter 132 of the General Statutes. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

Chapter 133.

Public Works.

Article 1.

General Provisions.

Sec.
133-1.1. Certain buildings involving public funds to be designed, etc., by architect or engineer.

Article 1.

General Provisions.

§ 133-1.1. Certain buildings involving public funds to be designed, etc., by architect or engineer.

(b) On all projects requiring the services of an architect or engineer, or both, the architect or engineer, or both, whose names and seals appear on the plans and specifications shall conduct frequent and regular inspections or such inspections as required by the contract and shall issue a signed and sealed certificate of compliance to the awarding authority that:

(1) The inspections of the construction, repairs, or installations have been conducted with the degree of care and professional skill and judgment ordinarily exercised by a member of that profession; and

(2) To the best of his knowledge and in the professional opinion of the architect or engineer the contractor has fulfilled the obligations of such plans, specifications, and contract.

No certificate of compliance shall be issued until the architect and/or engineer is satisfied that the contractor has fulfilled the obligations of such plans, specifications, and contract.

(1953, c. 1339; 1957, c. 994; 1963, c. 752; 1973, c. 1414, s. 2; 1979, c. 891; 1981, c. 687; 1983 (Reg. Sess., 1984), c. 970, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, rewrote subsection (b).

Chapter 134A.

Youth Services.

Article 1.

Division of Youth Services in the Department of Human Resources.

§ 134A-1. Legislative intent and purpose.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, sets out legislative findings with regard to the children identified as a class in the case of Willie M., et al. vs. Hunt, et al. The section also indicates the legislative intent with regard to expenditure of funds appropriated for the class members and provides for a supplemental reserve fund to be allocated to local education agencies to serve class members. In addition, the section sets out reporting requirements and authorizes the Department of Human Resources to ensure the provision of appropriate services to class members where a local program is not providing appropriate services.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 76, provides that in addition to reports required by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 61, the Department of Human Resources and Public Education shall report periodically to the Commission on Children with Special Needs, as requested by the Commission, on operations of programs to benefit Willie M. class members.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256, and c. 1116, s. 115, are severability clauses.

Chapter 135.

Retirement System for Teachers and State Employees; Social Security.

Article 1.

Retirement System for Teachers and State Employees.

Sec.

135-1. Definitions.
135-3. (Effective until September 1, 1985) Membership.
135-3. (Effective September 1, 1985) Membership.
135-4. Creditable service.
135-5. Benefits.
135-6. Administration.

Article 3.

Other Teacher, Employee Benefits.

Part 3. Comprehensive Major Medical Plan.

135-40.1. General definitions.
135-40.6. Benefits subject to deductible and coinsurance (comprehensive benefits).
135-40.7A. Special provisions for chemical dependency.

Article 4.

Consolidated Judicial Retirement Act.

135-50. Short title and purpose.
135-51. Scope.
135-53. Definitions.
135-54. Name and date of establishment.
135-55. Membership.
135-56. Creditable service.
135-56.1. [Repealed.]
135-56.2. Creditable service for other employment.
135-58. Service retirement benefits.
135-60. Disability retirement benefits.
135-62. Return of accumulated contributions.
135-65. Post-retirement increases in allowances.
135-70. Transfer of members to another system.
135-71. (Effective until September 1, 1985) Return to membership of retired former member.
135-71. (Effective September 1, 1985) Return to membership of retired former member.
135-72. Benefits of members appointed to serve in United States courts.

Article 4A.

Uniform Solicitorial Retirement Act of 1974.

135-77 to 135-83. [Repealed.]

Article 4B.

Uniform Clerks of Superior Court Retirement Act of 1975.

135-84 to 135-86. [Repealed.]

Article 5.

Supplemental Retirement Income Act of 1984.

135-90. Short title and purpose.
135-91. Administration.
135-92. Membership.
135-93. Contributions.
135-94. Benefits.
135-95. Exemption from taxes, garnishment, attachment.

Article 1.

Retirement System for Teachers and State Employees.

§ 135-1. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(11b) "Law-Enforcement Officer" means a full-time paid employee of an employer who is actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State of North Carolina or serving civil processes, and who possesses the power of arrest by virtue of an oath administered under the authority of the State.

(1941, c. 25, s. 1; 1943, c. 431; 1945, c. 924; 1947, c. 458, s. 6; 1953, c. 1053; 1955, c. 818; c. 1155, s. 8½; 1959, c. 513, s. 1; c. 1263, s. 1; 1963, c. 687, s. 1; 1965, c. 750; c. 780, s. 1; 1969, c. 44, s. 74; c. 1223, s. 16; c. 1227; 1971, c. 117, ss. 1-5; c. 338, s. 1; 1973, c. 507, s. 5; c. 640, s. 2; c. 1233; 1975, c. 475, s. 1; 1977, c. 574, s. 1; 1979, c. 972, s. 1; 1981, c. 557, ss. 1, 2; 1983, c. 412, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 227.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 114, provides:

"Notwithstanding the provisions of Chapter 135 of the General Statutes, any member of the Teachers' and State Employees' Retirement System who was at least 60 years of age with 25 or more years of creditable service and who retired on a reduced service retirement allowance between July 1, 1981, and June 30, 1983, shall have his retirement allowance increased by the elimination of the reduction factors applicable at the time of retirement. This increase in retirement allowances shall apply equally to the allowance of surviving annuitant of a beneficiary. This section shall become effective on the first of the month following a determination by the System's consulting actuary that sufficient gains are available in the System to pay the total present value actuarial cost of the increased retirement allowance."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, added subdivision (11b).

CASE NOTES

The Teachers' and State Employees' Retirement System of North Carolina is an agency or instrumentality of the State. Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

§ 135-2. Name and date of establishment.

CASE NOTES

The Teachers' and State Employees' Retirement System of North Carolina is an agency or instrumentality of the State. Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

§ 135-3. (Effective until September 1, 1985) Membership.

The membership of this Retirement System shall be composed as follows:

(1) All persons who shall become teachers or State employees after the date as of which the Retirement System is established. On and after July 1, 1947, membership in the Retirement System shall begin 90 days after the election, appointment or employment of a "teacher or employee" as the terms are defined in this Chapter. On and after July 1, 1955, membership in the Retirement System shall begin immediately upon the election, appointment or employment of a "teacher or employee," as the terms are defined in this Chapter. Under such rules and regulations as the Board of Trustees may establish and promulgate, Cooperative Agricultural Extension Service employees may in the discretion of the governing authority of a county, become members of the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county. On and after July 1, 1965, new extension service employees in the employ

§ 135-3 is set out twice. See section heading for effective dates.

of a county participating in the Local Governmental Employees' Retirement System are hereby excluded from participation in the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county; provided that on and after July 1, 1965, new extension service employees who are required to accept a federal civil service appointment may elect in writing, on a form acceptable to the Retirement System, to be excluded from the Teachers' and State Employees' Retirement System and the Local Retirement System. On or after July 1, 1979, upon election, appointment or employment, a legislative employee shall automatically become a member of the Teachers' and State Employees' Retirement System.

(2) All persons who are teachers or State employees on February 17, 1941, or who may become teachers or State employees on or before July 1, 1941, except those who shall notify the Board of Trustees, in writing, on or before January 1, 1942, that they do not choose to become members of this Retirement System, shall become members of the Retirement System.

(3) Should any member in any period of six consecutive years after becoming a member be absent from service more than five years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member: Provided that on and after July 1, 1967, should any member in any period of eight consecutive years after becoming a member be absent from service more than seven years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member; provided further that the period of absence from service shall be computed from January 1, 1962, or later date of separation for any member whose contributions were not withdrawn prior to July 1, 1967: Provided that on and after July 1, 1971, a member shall cease to be a member only if he withdraws his accumulated contributions, or becomes a beneficiary, or dies.

(4) Notwithstanding any provisions contained in this section, any employee of the State of North Carolina who was taken over and required to perform services for the federal government, on a loan basis, and by virtue of an executive order of the President of the United States effective on or after January 1, 1942, and who on the effective date of such executive order was a member of the Retirement System and had not withdrawn all of his or her accumulated contributions, shall be deemed to be a member of the Retirement System during such period of federal service or employment by virtue of such executive order of the President of the United States. Any such employee who within a period of 12 months after the cessation of such federal service or employment, is again employed by the State or any employer as said term is defined in this Chapter, or within said period of 12 months engages in service or membership service, shall be permitted to resume active participation in the Retirement System and to resume his or her contributions as provided by this Chapter. If such member so elects, he or she may pay to the Board of Trustees for the benefit of the proper fund or account an amount equal to his or her accumulated contributions previously withdrawn with interest from date of withdrawal to time of payment and the accumulated contributions, with interest thereon, that such member would have made during such period of federal employment to the same extent as if such member had been in service or engaged in the membership service for the State or an employer as defined in this Chapter, which

§ 135-3 is set out twice. See section heading for effective dates.

such payment of accumulated contributions shall be computed on the basis of the salary or earnable compensation received by such member on the effective date of such executive order.

(5) Any teacher or State employee whose membership is contingent on his own election and who elects not to become a member may thereafter apply for and be admitted to membership; but no such teacher or State employee shall receive prior service credit unless he elected to become a member prior to July 1, 1946. Any such member on or after June 30, 1965, anything in this Chapter to the contrary, may deposit in the annuity savings fund by a single payment the contributions plus interest which would have been credited to his account had he not signed a nonelection blank on or before January 1, 1942, and be entitled to such membership service credits and any prior service credits which became void upon execution of such nonelection blank; provided that the employer will pay the appropriate matching contributions.

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1396, s. 1, effective July 1, 1982.

(7) The provisions of this subdivision (7) shall apply to any member whose retirement became effective prior to July 1, 1963, and who became entitled to benefits hereunder in accordance with the provisions hereof. Such benefits shall be computed in accordance with the provisions of G.S. 135-5(b) as in effect at the date of such retirement.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(d), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years: Provided, that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 135-5(b), subdivisions (1), (2) and (3).

b. In lieu of the benefits provided in paragraph a of this subdivision (7) any member who separates from service on or after July 1, 1951, and prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 135-5(d), after completing 30 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on an early retirement allowance; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided further that such application shall be duly filed within 60 days following the date of such separation. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of the age of 60 years upon proper application therefor.

c. In lieu of the benefits provided in paragraph a of this subdivision (7), any member who separated from service before July 1, 1951, and prior to the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(d), and who left his total accumulated contributions in said System, may elect

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to retire on an early retirement allowance; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, subsequent to July 1, 1951, and not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided that such application shall be duly filed not later than August 31, 1951. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of the age of 60 years upon proper application therefor.

d. Should a teacher or employee who retired on an early or service retirement allowance be restored to service prior to the attainment of the age of 62 years, his allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the uniform contribution rate payable by all members. Upon his subsequent retirement, he shall be entitled to the allowance described in 1 below reduced by the amount in 2 below.

1. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement, and his creditable service after he was restored to service.

2. The actuarial equivalent of the retirement benefits he previously received.

e. Should a teacher or employee who retired on an early or service retirement allowance be restored to service after the attainment of the age of 62 years, his retirement allowance shall be reduced to the extent necessary (if any) so that the sum of the retirement allowance at the time of his retirement and earnings from employment by a unit of the Retirement System for any year (beginning January 1, and ending December 31) will not exceed the member's compensation received for the 12 months of service prior to retirement. Provided, however, that under no circumstances will the member's retirement allowance be reduced below the amount of his annuity as defined in G.S. 135-1(3).

(8) The provisions of this subsection (8) shall apply to any member whose membership is terminated on or after July 1, 1963 and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 15 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; and further provided that in the case of a member who so separates from service on or after July 1, 1967 or whose account is active on July 1, 1967, or has not withdrawn his contributions, the aforestated requirement of 15 or more years of creditable service shall be reduced to 12 or more years of creditable service; and further provided that in the

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case of a member who so separates from service on or after July 1, 1971, or whose account is active on July 1, 1971, the aforestated requirement of 12 or more years of creditable service shall be reduced to five or more years of creditable service. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 135-5(b1); provided that such benefits will be computed in accordance with (b2) on or after July 1, 1967, but prior to July 1, 1969; and provided further that such benefits will be computed in accordance with (b3) on or after July 1, 1969. Notwithstanding the foregoing, any member whose services as a teacher or employee are terminated for any reason other than retirement, who becomes employed by a nonprofit, nonsectarian private school in North Carolina below the college level within one year after such teacher or employee has ceased to be a teacher or employee, may elect to leave his total accumulated contributions in the Teachers' and State Employees' Retirement System during the period he is in the employment of such employer; provided that he files notice thereof in writing with the Board of Trustees of the Retirement System within five years after separation from service as a public school teacher or State employee; such member shall be deemed to have met the requirements of the above provisions of this subdivision upon attainment of age 60 while in such employment provided that he is otherwise vested.

b. In lieu of the benefits provided in paragraph a of this subdivision (8), any member who separates from service prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on an early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such early retirement allowance so elected shall be equal to the deferred retirement allowance otherwise payable at the attainment of the age of 60 years reduced by the percentage thereof indicated below.

Age at Retirement	*Percentage Reduction*
59	7
58	14
57	20
56	25
55	30
54	35
53	39
52	43
51	46
50	50

b1. In lieu of the benefits provided in paragraphs a and b of this subdivision, any member who is a law enforcement officer at the time of separation from service prior to the attainment of the age of 50 years, for any reason other than death or disability as provided in this Article, after completing 15 or more years of

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creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System may elect to retire on a deferred early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided, that the member may commence retirement only upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred early retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law enforcement officers.

b2. In lieu of the benefits provided in paragraphs a and b of this subdivision, any member who is a law enforcement officer at the time of separation from service prior to the attainment of the age of 55 years, for any reason other than death or disability as provided in this Article, after completing five or more years of creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System may elect to retire on a deferred early retirement allowance upon attaining the age of 55 years or at any time thereafter; provided, that the member may commence retirement only upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred early retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law enforcement officers.

c. Should a beneficiary who retired on an early or service retirement allowance be restored to service for a period of time exceeding six calendar months, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the uniform contribution rate payable by all members. Notwithstanding the foregoing, the beneficiary may irrevocably elect to commence membership immediately upon being restored to service, with cessation of his retirement allowance; and, the acceptance of the first monthly retirement allowance after being restored to service shall be an election to delay membership for the aforementioned six calendar months. Upon his subsequent retirement, he shall be entitled to the greater of the two allowances described in 1 and 2 below.

1. The allowance to which he would be entitled had he not been restored to service with cessation of retirement allowance, plus the allowance to which he would be entitled on account of his service after restoration to service and membership; Provided, for the sole purpose of determining retirement eligibility on account of his service after restoration, that his creditable service shall be taken as the sum of his creditable service prior to and subsequent to his restoration to service; or

2. The allowance to which he would be entitled if his retirement were commencing for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service prior to and subsequent to his restoration to service, reduced by the actuarial equivalent of the retire-

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ment allowance he previously received; provided, in no event may he alter his Election of Optional Allowance as previously made.

d. Should a beneficiary who retired on an early or service retirement allowance be employed by an employer participating in the Retirement System as an employee meeting less than the definition of service as used in this Chapter or on a contractual or fee basis for a period of time exceeding six calendar months, and if the beneficiary earns compensation for the employment in any calendar year which exceeds an amount equal to sixty percent (60%) of his gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding compensation on account of termination, with the amount indexed as hereinafter provided, then the retirement allowance of the beneficiary shall be reduced by the amount of his earned compensation which exceeds the sixty percent (60%) of gross compensation prior to retirement; Provided, in no event shall the retirement allowance of a beneficiary be less than the amount of his annuity as defined in this Chapter. The amount a beneficiary may earn before reduction shall be increased on January 1 each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of a percent ($^1/_{10}$ of 1%).

(8a) Notwithstanding the provisions of paragraphs b1 and b2 of subdivision (8) to the contrary, a beneficiary who was a beneficiary retired on an early or service retirement with the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officers employed by the State and beneficiaries last employed by the State to this Retirement System on January 1, 1985, and who also was a contributing member of this Retirement System on January 1, 1985, shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership.

(9) Members who are participating in an intergovernmental exchange of personnel under the provisions of Article 10 of Chapter 126 may retain their membership status and receive all benefits provided by this Chapter during the period of the exchange provided the requirements of Article 10 of Chapter 126 are met; provided further, that a member participating in an intergovernmental exchange of personnel under Article 10 of Chapter 126 shall, notwithstanding whether he and his employer are making contributions to the member's account during the exchange period, be entitled to the death benefit if he otherwise qualifies under the provisions of this Article and provided further that no duplicate benefits shall be paid. (1941, c. 25, s. 3; 1945, c. 799; 1947, c. 414; c. 457, ss. 1, 2; c. 458, s. 5; c. 464, s. 2; 1949, c. 1056, s. 1; 1951, c. 561; 1955, c. 1155, s. 9½; 1961, c. 516, ss. 1, 2; 1963, c. 687, s. 2; 1965, c. 780, s. 1; c. 1187; 1967, c. 720, ss. 1, 2, 15; c. 1234; 1969, c. 1223, ss. 1, 2, 14; 1971, c. 117, ss. 6-8; c. 118, ss. 1, 2; 1973, c. 241, s. 1; c. 994, s. 5; c. 1363; 1977, c. 783, s. 3; 1979, c. 396; c. 972, s. 2; 1981, c. 979, s. 1; 1981 (Reg. Sess., 1982), c. 1396, ss. 1, 2; 1983, c. 556, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 228, 229, 236.)

Section Set Out Twice. — The section above is effective until September 1, 1985. For this section as amended effective September 1, 1985, see the following section, also numbered § 135-3.

§ 135-3 is set out twice. See section heading for effective dates.

Editor's Note. —
Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, deleted the former fourth, fifth and sixth sentences of subdivision (1), relating to State highway patrolmen and other law-enforcement officers, and added paragraphs (8) b1 and (8) b2 and subdivision (8a).

§ 135-3. (Effective September 1, 1985) Membership.

The membership of this Retirement System shall be composed as follows:

(1) All persons who shall become teachers or State employees after the date as of which the Retirement System is established. On and after July 1, 1947, membership in the Retirement System shall begin 90 days after the election, appointment or employment of a "teacher or employee" as the terms are defined in this Chapter. On and after July 1, 1955, membership in the Retirement System shall begin immediately upon the election, appointment or employment of a "teacher or employee," as the terms are defined in this Chapter. Under such rules and regulations as the Board of Trustees may establish and promulgate, Cooperative Agricultural Extension Service employees may in the discretion of the governing authority of a county, become members of the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county. On and after July 1, 1965, new extension service employees in the employ of a county participating in the Local Governmental Employees' Retirement System are hereby excluded from participation in the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county; provided that on and after July 1, 1965, new extension service employees who are required to accept a federal civil service appointment may elect in writing, on a form acceptable to the Retirement System, to be excluded from the Teachers' and State Employees' Retirement System and the Local Retirement System. On or after July 1, 1979, upon election, appointment or employment, a legislative employee shall automatically become a member of the Teachers' and State Employees' Retirement System.

(2) All persons who are teachers or State employees on February 17, 1941, or who may become teachers or State employees on or before July 1, 1941, except those who shall notify the Board of Trustees, in writing, on or before January 1, 1942, that they do not choose to become members of this Retirement System, shall become members of the Retirement System.

(3) Should any member in any period of six consecutive years after becoming a member be absent from service more than five years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member: Provided that on and after July 1, 1967, should any member in any period of eight consecutive years after becoming a member be absent from service more than seven years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member; provided further that the period of absence from service shall be computed from January 1, 1962, or later date of separation for any member whose contributions were not withdrawn prior to July 1, 1967: Provided that on and after July 1, 1971, a member shall cease to be a member only if he withdraws his accumulated contributions, or becomes a beneficiary, or dies.

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(4) Notwithstanding any provisions contained in this section, any employee of the State of North Carolina who was taken over and required to perform services for the federal government, on a loan basis, and by virtue of an executive order of the President of the United States effective on or after January 1, 1942, and who on the effective date of such executive order was a member of the Retirement System and had not withdrawn all of his or her accumulated contributions, shall be deemed to be a member of the Retirement System during such period of federal service or employment by virtue of such executive order of the President of the United States. Any such employee who within a period of 12 months after the cessation of such federal service or employment, is again employed by the State or any employer as said term is defined in this Chapter, or within said period of 12 months engages in service or membership service, shall be permitted to resume active participation in the Retirement System and to resume his or her contributions as provided by this Chapter. If such member so elects, he or she may pay to the Board of Trustees for the benefit of the proper fund or account an amount equal to his or her accumulated contributions previously withdrawn with interest from date of withdrawal to time of payment and the accumulated contributions, with interest thereon, that such member would have made during such period of federal employment to the same extent as if such member had been in service or engaged in the membership service for the State or an employer as defined in this Chapter, which such payment of accumulated contributions shall be computed on the basis of the salary or earnable compensation received by such member on the effective date of such executive order.

(5) Any teacher or State employee whose membership is contingent on his own election and who elects not to become a member may thereafter apply for and be admitted to membership; but no such teacher or State employee shall receive prior service credit unless he elected to become a member prior to July 1, 1946. Any such member on or after June 30, 1965, anything in this Chapter to the contrary, may deposit in the annuity savings fund by a single payment the contributions plus interest which would have been credited to his account had he not signed a nonelection blank on or before January 1, 1942, and be entitled to such membership service credits and any prior service credits which became void upon execution of such nonelection blank; provided that the employer will pay the appropriate matching contributions.

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1396, s. 1, effective July 1, 1982.

(7) The provisions of this subdivision (7) shall apply to any member whose retirement became effective prior to July 1, 1963, and who became entitled to benefits hereunder in accordance with the provisions hereof. Such benefits shall be computed in accordance with the provisions of G.S. 135-5(b) as in effect at the date of such retirement.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(d), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years: Provided, that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution

§ 135-3 is set out twice. See section heading for effective dates.

and filing thereof, he desires to be retired. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 135-5(b), subdivisions (1), (2) and (3).

b. In lieu of the benefits provided in paragraph a of this subdivision (7) any member who separates from service on or after July 1, 1951, and prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 135-5(d), after completing 30 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on an early retirement allowance; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided further that such application shall be duly filed within 60 days following the date of such separation. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of the age of 60 years upon proper application therefor.

c. In lieu of the benefits provided in paragraph a of this subdivision (7), any member who separated from service before July 1, 1951, and prior to the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(d), and who left his total accumulated contributions in said System, may elect to retire on an early retirement allowance; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, subsequent to July 1, 1951, and not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided that such application shall be duly filed not later than August 31, 1951. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of the age of 60 years upon proper application therefor.

d. Should a teacher or employee who retired on an early or service retirement allowance be restored to service prior to the attainment of the age of 62 years, his allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the uniform contribution rate payable by all members. Upon his subsequent retirement, he shall be entitled to the allowance described in 1 below reduced by the amount in 2 below.

1. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement, and his creditable service after he was restored to service.
2. The actuarial equivalent of the retirement benefits he previously received.

e. Should a teacher or employee who retired on an early or service retirement allowance be restored to service after the attainment of the age of 62 years, his retirement allowance shall be reduced to the extent necessary (if any) so that the sum of the retirement allowance at the time of his retirement and earnings from employment by a unit of the Retirement System for any year (beginning January 1, and ending December 31) will not exceed

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the member's compensation received for the 12 months of service prior to retirement. Provided, however, that under no circumstances will the member's retirement allowance be reduced below the amount of his annuity as defined in G.S. 135-1(3).

(8) The provisions of this subsection (8) shall apply to any member whose membership is terminated on or after July 1, 1963 and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 15 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; and further provided that in the case of a member who so separates from service on or after July 1, 1967 or whose account is active on July 1, 1967, or has not withdrawn his contributions, the aforestated requirement of 15 or more years of creditable service shall be reduced to 12 or more years of creditable service; and further provided that in the case of a member who so separates from service on or after July 1, 1971, or whose account is active on July 1, 1971, the aforestated requirement of 12 or more years of creditable service shall be reduced to five or more years of creditable service. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 135-5(b1); provided that such benefits will be computed in accordance with (b2) on or after July 1, 1967, but prior to July 1, 1969; and provided further that such benefits will be computed in accordance with (b3) on or after July 1, 1969. Notwithstanding the foregoing, any member whose services as a teacher or employee are terminated for any reason other than retirement, who becomes employed by a nonprofit, nonsectarian private school in North Carolina below the college level within one year after such teacher or employee has ceased to be a teacher or employee, may elect to leave his total accumulated contributions in the Teachers' and State Employees' Retirement System during the period he is in the employment of such employer; provided that he files notice thereof in writing with the Board of Trustees of the Retirement System within five years after separation from service as a public school teacher or State employee; such member shall be deemed to have met the requirements of the above provisions of this subdivision upon attainment of age 60 while in such employment provided that he is otherwise vested.

b. In lieu of the benefits provided in paragraph a of this subdivision (8), any member who separates from service prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on an early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided that such member

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may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such early retirement allowance so elected shall be equal to the deferred retirement allowance otherwise payable at the attainment of the age of 60 years reduced by the percentage thereof indicated below.

Age at Retirement	*Percentage Reduction*
59	7
58	14
57	20
56	25
55	30
54	35
53	39
52	43
51	46
50	50

b1. In lieu of the benefits provided in paragraphs a and b of this subdivision, any member who is a law-enforcement officer at the time of separation from service prior to the attainment of the age of 50 years, for any reason other than death or disability as provided in this Article, after completing 15 or more years of creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System may elect to retire on a deferred early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided, that the member may commence retirement only upon written application to he Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred early retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law-enforcement officers.

b2. In lieu of the benefits provided in paragraphs a and b of of this subdivision, any member who is a law-enforcement officer at the time of separation from service prior to the attainment of the age of 55 years, for any reason other than death or disability as provided in this Article, after completing five or more years of creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System may elect to retire on a deferred early retirement allowance upon attaining the age of 55 years or at any time thereafter; provided, that the member may commence retirement only upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred early retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law-enforcement officers.

c. Should a beneficiary who retired on an early or service retirement allowance be reemployed by an employer participating in the Retirement System on a permanent full-time, part-time, tempo-

§ 135-3 is set out twice. See section heading for effective dates.

rary, or on fee-for-service basis, whether contractual or otherwise, the retirement allowance shall be suspended if the beneficiary receives or earns any of the following:

1. Salary or fees or both in excess of one thousand five hundred dollars ($1,500) per month;
2. Salary or fees or both in excess of thirteen thousand five hundred ($13,500) during any consecutive 12 calendar months;
3. Salary or fees or both during any consecutive 12 calendar months, which is greater than fifty percent (50%) of the reported compensation during the 12 months of service preceding the effective date of retirement; or
4. Salary or fees or both during any month, which when added to the retirement allowance at retirement exceeds the monthly compensation earned immediately prior to retirement, if reemployed by the same employer within 90 days of the effective date of retirement.

The suspension of the retirement allowance shall be effective as of the first day of the month in which the beneficiary meets the conditions set forth in conditions 1 or 4 of this paragraph and effective as of the first day of the next succeeding month following the month in which the beneficiary meets the conditions set forth in conditions 2 or 3 of this paragraph. The retirement allowance shall be reinstated the month following termination of reemployment or the month following the month in which the conditions set forth in this paragraph are no longer met. The Board of Trustees may adjust the monetary limits in this paragraph by an amount equivalent to any across-the-board salary increase granted to employees of the State by the General Assembly. Each employer shall report information monthly to the Board of Trustees on forms provided by the Board on each reemployed beneficiary sufficient for the effective enforcement of this paragraph. Notwithstanding the foregoing, any beneficiary may irrevocable elect to recommence membership in the Retirement System immediately upon being restored to service, whereupon the retirement allowance shall cease.

d. A beneficiary whose retirement allowance is suspended in accordance with the provisions of paragraph c and who is restored to service shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members.

Upon his subsequent retirement, he shall be paid a retirement allowance determined as follows:

1. For a member who earns at least three years' membership service after restoration to service, the retirement allowance shall be computed on the basis of his compensation and service before and after the period of prior retirement without restrictions; provided, that if the prior allowance was based on a social security leveling payment option, the allowance shall be adjusted actuarially for the difference between the amount received under the optional payment and what would have been paid if the retirement allowance had been paid without optional modification.
2. For a member who does not earn three years' membership service after restoration to service, the retirement allowance shall be equal to the sum of the retirement allowance to which he would have been entitled had he not been restored

§ 135-3 is set out twice. See section heading for effective dates.

to service, without modification of the election of an optional allowance previously made, and the retirement allowance that results from service earned since being restored to service; provided, that if the prior retirement allowance was based on a social security leveling payment option, the prior allowance shall be adjusted actuarially for the difference between the amount that would have been paid for each month had the payment not been suspended and what would have been paid if the retirement allowance had been paid without optional modification.

e. Any beneficiary who retired on an early or service retirement allowance as an employee of any State department, agency or institution under the Law Enforcement Officers' Retirement System and becomes employed as an employee by a State department, agency, or institution as an employer participating in the Retirement System shall become subject to the provisions of G.S. 135-3(8)c and G.S. 135-3(8)d on and after January 1, 1989.

(8a) Notwithstanding the provisions of paragraphs b1 and b2 of subdivision (8) to the contrary, a beneficiary who was a beneficiary retired on an early or service retirement with the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officers employed by the State and beneficiaries last employed by the State to this Retirement System on January 1, 1985, and who also was a contributing member of this Retirement System on January 1, 1985, shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership.

(9) Members who are participating in an intergovernmental exchange of personnel under the provisions of Article 10 of Chapter 126 may retain their membership status and receive all benefits provided by this Chapter during the period of the exchange provided the requirements of Article 10 of Chapter 126 are met; provided further, that a member participating in an intergovernmental exchange of personnel under Article 10 of Chapter 126 shall, notwithstanding whether he and his employer are making contributions to the member's account during the exchange period, be entitled to the death benefit if he otherwise qualifies under the provisions of this Article and provided further that no duplicate benefits shall be paid. (1941, c. 25, s. 3; 1945, c. 799; 1947, c. 414; c. 457, ss. 1, 2; c. 458, s. 5; c. 464, s. 2; 1949, c. 1056, s. 1; 1951, c. 561; 1955, c. 1155, s. 9½; 1961, c. 516, ss. 1, 2; 1963, c. 687, s. 2; 1965, c. 780, s. 1; c. 1187; 1967, c. 720, ss. 1, 2, 15; c. 1234; 1969, c. 1223, ss. 1, 2, 14; 1971, c. 117, ss. 6-8; c. 118, ss. 1, 2; 1973, c. 241, s. 1; c. 994, s. 5; c. 1363; 1977, c. 783, s. 3; 1979, c. 396; c. 972, s. 2; 1981, c. 979, s. 1; 1981 (Reg. Sess., 1982), c. 1396, ss. 1, 2; 1983, c. 556, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 228, 229, 236; c. 1106, ss. 1, 2, 4.)

Section Set Out Twice. — The section above is effective September 1, 1985. For this section as in effect until September 1, 1985, see the preceding section, also numbered § 135-3.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1034, effective January 1, 1985, deleted the former fourth, fifth and sixth sentences of subdivision (1), relating to State highway patrolmen and other law-enforcement officers, and added paragraphs (8) b1 and (8) b2 and subdivision (8a).

The 1983 (Reg. Sess., 1984) amendment by c. 1106, effective September 1, 1985, and not applicable to agreements entered into before the effective date of the act, rewrote paragraphs (8)c and (8)d and added paragraph (8)e.

§ 135-3 is set out twice. See section heading for effective dates.

§ 135-4. Creditable service.

(a) Under such rules and regulations as the Board of Trustees shall adopt, each member who was a teacher or State employee at any time during the five years immediately preceding the establishment of the System and who became a member prior to July 1, 1946, shall file a detailed statement of all North Carolina service as a teacher or State employee rendered by him prior to the date of establishment for which he claims credit; provided, that, notwithstanding the foregoing, any member retiring on or after July 1, 1965, with credit for not less than 10 years of membership service shall file such detailed statement of service as a teacher or State employee rendered by him prior to July 1, 1941, for which he claims credit; provided, that any member who retired on a service retirement allowance prior to July 1, 1965, who at the time of his retirement did not qualify for credit for his service as a teacher or State employee prior to July 1, 1941, may request on and after July 1, 1971, that his original benefit be recalculated, in accordance with the formula prevailing at the time of his retirement, to include credit for such service with the new benefit to become effective on the first of the month following certification of the prior service.

(e) Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of service certified on his prior service certificate; and if he has sick leave standing to his credit upon retirement on or after July 1, 1971, one month of credit for each 20 days or portion thereof not to exceed one month of credit for each two years of membership service or fraction thereof, but sick leave shall not be counted in computing creditable service for the purpose of determining eligibility for service retirement, disability retirement, early retirement or for a vested deferred allowance.

On and after July 1, 1971, a member whose account was closed on account of absence from service under the provisions of G.S. 135-3(3) and who subsequently returns to service for a period of five years, may thereafter repay in a lump sum the amount withdrawn plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service by the amount of creditable service lost when his account was closed.

On and after July 1, 1973, a member whose account in the North Carolina Local Governmental Employees' Retirement System was closed on account of absence from service under the provisions of G.S. 128-24(1a) and who subsequently became or becomes a member of this System with credit for five years of service, may thereafter repay in a lump sum the amount withdrawn from the North Carolina Local Governmental Employees' Retirement System plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service in this System by the amount of creditable service lost when his account was closed.

On or after July 1, 1979, a member who has obtained 60 months of aggregate service, or five years of membership service, as an employee of the North Carolina General Assembly, except legislators, participants in the Legislative Intern Program and pages, may make a lump sum payment together with interest, and an administrative fee for such service, to the Teachers' and State Employees' Retirement System of an amount equal to what he would have contributed had he been a member on his first day of employment.

On and after January 1, 1985, the creditable service of a member who was a member of the Law-Enforcement Officers' Retirement System at the time of the transfer of law-enforcement officers employed by the State from that Sys-

tem to this Retirement System and whose accumulated contributions are transferred from that System to this Retirement System, shall include service that was creditable in the Law-Enforcement Officers' Retirement System; and membership service with that System shall be membership service with this Retirement System; provided, notwithstanding any provision of this Article to the contrary, any inchoate or accrued rights of such a member to purchase creditable service for military service, withdrawn service and prior service under the rules and regulations of the Law-Enforcement Officers' Retirement System shall not be diminished and may be purchased as creditable service with this Retirement System under the same conditions which would have otherwise applied.

(f) Armed Service Credit. —

(1) Teachers and other State employees who entered the armed services of the United States on or after September 16, 1940, and prior to February 17, 1941, and who returned to the service of the State within a period of two years after they were first eligible to be separated or released from such armed services under other than dishonorable conditions shall be entitled to full credit for all prior service.

(2) Teachers and other State employees who entered the armed services of the United States on or after September 16, 1940, and who returned to the service of the State prior to October 1, 1952, or who devote not less than 10 years of service to the State after they are separated or released from such armed services under other than dishonorable conditions, shall be entitled to full credit for all prior service, and, in addition they shall receive membership service credit for the period of service in such armed services up to the date they were first eligible to be separated or released therefrom, occurring after the date of establishment of the Retirement System.

(3) Teachers and other State employees who enter the armed services of the United States on or after July 1, 1950, or who engage in active military service on or after July 1, 1950, and who return to the service of the State within a period of two years after they are first eligible to be separated or released from such active military service under other than dishonorable conditions shall be entitled to full membership service credit for the period of such active service in the armed services.

(4) Under such rules as the board of trustees shall adopt, credit will be provided by the Retirement System with respect to each such teacher or other State employee in the amounts that he would have been paid during such service in such armed services on the basis of his earnable compensation when such service commenced. Such contributions shall be credited to the individual account of the member in the annuity savings fund, in such manner as the board of trustees shall determine, but any such contributions so credited and any regular interest thereon shall be available to the member only in the form of an annuity, or benefit in lieu thereof, upon his retirement on a service, disability or special retirement allowance; and in the event of cessation of membership or death prior thereto, any such contributions so credited and regular interest thereon shall not be payable to him or on his account, but shall be transferred from the annuity savings fund to the pension accumulation fund. If any payments were made by a member on account of such service as provided by subdivision (5) of subsection (b) of G.S. 135-8, the Board of Trustees shall refund to or reimburse such member for such payments.

(5) The provisions of this subsection shall also apply to members of the national guard with respect to teachers and State employees who are

called into federal service or who are called into State service, to the extent that such persons fail to receive compensation for performance of the duties of their employment other than for service in the national guard.

(6) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(k) Notwithstanding any other provision of this Chapter, any person who withdrew his contributions in accordance with the provisions of G.S. 128-27(f) or 135-5(f) or the rules and regulations of the the Law-Enforcement Officers' Retirement System and who subsequently returns to service may, upon completion of 10 years of membership service, repay in a total lump sum any and all of the accumulated contributions previously withdrawn with sufficient interest added thereto to cover one half of the cost of providing such additional credit plus a fee to cover expense of handling which shall be determined by the Board of Trustees and receive credit for the service forfeited at time of withdrawal(s), provided that he left service prior to July 1, 1974. Any person who leaves service after June 30, 1974, and who withdraws his contributions in accordance with G.S. 128-27(f) or 135-5(f) or the rules and regulations of the Law-Enforcement Officers' Retirement System and who subsequently returns to service may, upon completion of 10 years of membership service, repay in a total lump sum any and all of the accumulated contributions previously withdrawn with sufficient interest added thereto to cover the full cost of providing such additional credit plus a fee to cover expense of handling which shall be determined by the Board of Trustees and receive credit for the service forfeited at time of withdrawal(s). These provisions shall apply equally to retired members who had attained 10 years of membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of a member is made.

(l) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(n) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(o) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(p1) Part-Time Service Credit. — Notwithstanding any other provision of this Chapter, upon completion of 10 years of membership service, any member may purchase service previously rendered as a part-time teacher or employee of the State, except for temporary or part-time service rendered while a full-time student in pursuit of a degree or diploma in a degree-granting program. Payment shall be made in a single lump sum in an amount equal to the full actuarial cost of providing credit for the service, together with interest and an administrative fee, as determined by the Board of Trustees on the advice of the Retirement System's actuary. Notwithstanding the provisions of G.S. 135-4(b), the Board of Trustees shall fix and determine by appropriate rules and regulations how much service in any year, as based on compensation, is equivalent to one year of service in proportion to "earnable compensation", but in no case shall more than one year of service be creditable for all service in one year. Service rendered for the regular school year in any district shall be equivalent to one year's service.

(t) Credit at Full Cost for Local Government Employment. — Any member may purchase creditable service for any employment as an employee, as defined in G.S. 128-21(10), of a local government employer not creditable in the North Carolina Local Governmental Employees' Retirement System upon completion of 10 years of membership service by making a lump-sum payment into the Annuity Savings Fund. The payment by the member shall be equal to the

full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the Retirement System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire with an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the actuary plus an administrative expense fee to be determined by the Board of Trustees. (1941, c. 25, s. 4; 1943, cc. 200, 783; 1945, c. 797; 1947, c. 575; 1949, c. 1056, ss. 2, 4; 1953, c. 1050, s. 3; 1959, c. 513, s. 1½; 1961, c. 516, s. 3; c. 779, s. 2; 1963, c. 1262; 1965, c. 780, s. 1; c. 924; 1967, c. 720, s. 3; 1969, c. 1223, ss. 3, 4; 1971, c. 117, ss. 9, 10; c. 993; 1973, c. 241, s. 2; c. 242, s. 1; c. 667, s. 2; c. 737, s. 1; c. 816, s. 1; c. 1063; c. 1311, ss. 1-5; 1975, c. 205, s. 2; c. 875, s. 47; 1977, cc. 317, 790; 1979, c. 826; c. 866, s. 2; c. 867; c. 972, s. 3; 1981, c. 557, s. 3; c. 636, s. 1; c. 1116, s. 1; 1981 (Reg. Sess., 1982), c. 1396, s. 4; 1983, c. 533, s. 1; c. 725; 1983 (Reg. Sess., 1984), c. 1030; c. 1034, ss. 230, 231; c. 1045, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1981, c. 636, s. 1, effective July 1, 1981, deleted subdivision (f)(6), which concerned purchase of service credit for service in the armed forces of the United States, subsection (l), which concerned purchase of credit for service to governmental entities, subsection (n), which defined "out-of-state service", and subsection (o), which concerned purchase of credit for time spent as a court reporter prior to establishment of the Uniform Court System, but provided that any inchoate or accrued rights of any member on July 1, 1981, shall not be diminished.

Prior to this amendment, subdivision (f)(6) and subsections (l), (n) and (o) read:

"(f) (6) Notwithstanding any other provision of this Chapter, teachers and other State employees not otherwise allowed service credit for service in the armed forces of the United States may, upon completion of 10 years of membership service, purchase such service credit by paying in a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at that time, with sufficient interest added thereto so as to equal one half the cost of allowing such service, plus a fee to cover expense of handling payment to be determined by the Board of Trustees and assessed the member at the time of payment; provided that credit will be allowed only for the initial period of active duty in the armed forces of the United States up to the time the member was first eligible to be separated or released therefrom, and subsequent periods of such active duty as required by the armed forces of the United States up to the date of first eligibility for separation or release therefrom; and further provided that the member submit satisfactory evidence of the service claimed and that service credit be allowed only for that period of active service in the armed forces of the United States not creditable in any other retirement system, except the national guard or any reserve component of the armed forces of the United States. These provisions shall apply equally to retired members who had attained 10 years of membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of a member is made.

"(l) Notwithstanding any other provision of this Chapter, any member may, upon completion of 10 years of current membership service, purchase credit for service previously rendered to any state, territory or other governmental subdivision of the United States other than this State at the rate of one year of out-of-state service for each two years of service in this State with a maximum allowable of 10 years of out-of-state service. Such service is limited to full-time service which would be allowable under the laws governing this System. Credit will be allowed only if no benefit is allowable in another public retirement system as a result of the service. Payment shall be permitted only on a total lump sum, an amount based on the compensation the member earned when he first entered membership and the employee contribution rate at that time and shall be equal to the full cost of providing credit for such service plus a fee to cover expense of handling which shall be determined by the Board of

Trustees. These provisions shall apply equally to retired members who had attained 10 years of membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of an individual is made.

Notwithstanding the foregoing provisions, any member may, upon completion of 10 years of current membership service, purchase Federal School, Overseas Dependent Schools, or Military Dependent Schools service, or, while on an approved leave of absence from employment with the State of North Carolina, foreign service in the International Cooperation Administration or the Agency for International Development upon the same terms as in the preceding paragraph for out-of-state service.

"(n) Wherever the terminology "out-of-state service," is used in this section, that terminology shall be interpreted to include the United States Public Health Service and time spent in the Merchant Marines while in the United States Naval Reserve.

"(o) Notwithstanding any other provision of this Chapter, a member who is presently a court reporter may buy in time spent serving as court reporter prior to the establishment of the Uniform Court System in 1968 by purchasing service credits, provided that the purchase payment equals the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities. Account shall be taken of the additional retirement allowance arising on account of the additional service credit commencing at the earliest date of which the member could retire or of a reduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 183, provides:

"Notwithstanding the provisions of G.S. 135-4(e) and G.S. 135-4(m), any otherwise qualified member who did not purchase prior service credits in the Teachers' and State Employees' Retirement System for employment with the General Assembly within three years after first eligibility may purchase such credits on or before December 31, 1984, as prescribed by G.S. 135-4(e). The difference between the full cost of allowing these service credits as defined in G.S. 135-4(m) and the member's cost pursuant to G.S. 135-4(e) shall be paid to the Retirement System from appropriations made to the General Assembly during the 1983 biennium."

Session Laws 1983 (Reg. Sess., 1984), c. 1045, s. 3, provides: "Notwithstanding any provision of this Article to the contrary, any inchoate or accrued rights of a member in service on July 1, 1974, for service credits at no cost for employment with a local government whose participation in the Local Governmental Employees' Retirement System began prior to July 1, 1984, shall in no way be diminished."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1030, effective January 1, 1985, added subsection (p1).

The 1983 (Reg. Sess., 1984) amendment by c. 1034, effective January 1, 1985, added the last paragraph of subsection (e), and in subsection (k) substituted "Law Enforcement Officers' Retirement System" for "Law Enforcement Officers' Benefit and Retirement Fund" in the first sentence and inserted "or the rules and regulations of the Law Enforcement Officers' Retirement System" in the second sentence.

The 1983 (Reg. Sess., 1984) amendment by c. 1045, effective June 29, 1984, deleted a proviso at the end of subsection (a), which read "provided, that any person who is a member of the Teachers' and State Employees' Retirement System on July 1, 1974, and who was previously employed by a participating unit of the North Carolina Local Governmental Employees' Retirement System and who terminated his service with such unit prior to its participation in the North Carolina Local Governmental Employees' Retirement System shall file a detailed statement of all service to such political entity," deleted a former second sentence of subsection (a), which read "Certification of such service shall be furnished to the Teachers' and State Employees' Retirement System," and added subsection (t).

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

§ 135-5. Benefits.

(a) Service Retirement Benefits. —

(1) Any member may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution of and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have

attained the age of 60 years and have at least five years of membership service or shall have completed 30 years of creditable service.

(2) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1019, s. 1.

(3) Any member who was in service October 8, 1981, who had attained 60 years of age, may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired.

(4) Any member who is a law-enforcement officer, and who attains age 50 and completes 15 or more years of creditable service in this capacity or who attains age 55 and completes five or more years of creditable service in this capacity, may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; Provided, also, any member who has met the conditions herein required but does not retire, and later becomes a teacher or an employee other than as a law-enforcement officer shall continue to have the right to commence retirement.

(b8) Service Retirement Allowance of Law-Enforcement Officers Retiring on or after January 1, 1985. — Upon retirement from service, in accordance with subsection (a) of this section, on or after January 1, 1985, a member who is a law-enforcement officer or an eligible former law-enforcement officer shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law-enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and fifty-seven one hundredths percent (1.57%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs after his 50th and before his 55th birthday with 15 or more years of creditable service as a law-enforcement officer and prior to his completion of 30 years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one-third of one percent (1/3 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 55th birthday.

(c) Disability Retirement Benefits. — Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, on the first day of any calendar month, not less than 30 and not more than 90 days next following the date of filing such application, on a disability retirement allowance: Provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired; Provided further the medical board shall determine if the member is able to engage in gainful employment and, if so, the member may still be retired and the disability retirement allowance as a result thereof shall be reduced as in subsection (e) below. Provided further, that the medical board shall not certify any member as disabled who:

(1) Applies for disability retirement based upon a mental or physical incapacity which existed when the member first established membership in the system; or

(2) Is in receipt of any payments on account of the same disability which existed when the member first established membership in the system.

The Board of Trustees shall require each employee upon enrolling in the retirement system to provide information on the membership application concerning any mental or physical incapacities existing at the time the member enrolls.

Supplemental disability benefits heretofore provided are hereby made a permanent part of disability benefits after age 65, and shall not be discontinued at age 65.

Notwithstanding the requirement of five or more years of creditable service to the contrary, a member who is a law-enforcement officer and who has had one year or more of creditable service and becomes incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty, and meets all other requirements for disability retirement benefits, may be retired by the Board of Trustees on a disability retirement allowance.

(e) Reexamination of Beneficiaries Retired for Disability. — Once each year during the first five years following retirement of a member on a disability retirement allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination, such examination to be made at the place of residence of said beneficiary or other place mutually agreed upon, by a physician or physicians designated by the Board of Trustees. Should any disability beneficiary who has not yet attained the age of 60 years refuse to submit to at least one medical examination in any such year by a physician or physicians designated by the Board of Trustees, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one year all his rights in and to his pension may be revoked by the Board of Trustees.

(1) The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months of service in the final 48 months prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. This difference shall be increased on January 1 each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of one percent (1/10th of 1%). Should the earning capacity of the disability beneficiary later change, the portion of his disability retirement allowance not provided by his contributions may be further modified. In lieu of the reductions on account of a disability beneficiary earning more than the aforesaid difference, he may elect to convert his disability retirement allowance to a service retirement allowance calculated on the basis of his average final compensation and creditable service at the time of disability and his age at the time of conversion to service retirement. This election is irrevocable. Provided, the provisions of this subdivision shall not apply to beneficiaries of the Law-Enforcement Officers' Retirement System transferred to this Retirement System who commenced retirement on and before July 1, 1981.

(2) Should a disability beneficiary under the age of 60 years be restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the same rate he paid prior to disability; provided that, on and after July 1, 1971, if a disability beneficiary under the age of 62 years is restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the uniform contribution rate payable by all members. Any such prior service certificate on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect, and, in addition, upon his subsequent retirement he shall be credited with all his service as a member, but should he be restored to active service on or after the attainment of the age of 50 years his pension upon subsequent retirement shall not exceed the sum of the pension which he was receiving immediately prior to his last restoration and the pension that he would have received on account of his service since his last restoration had he entered service at the time as a new entrant.

(3) Notwithstanding the foregoing, a member retired on a disability retirement allowance who is restored to service and subsequently retires on or after July 1, 1971, shall be entitled to an allowance not less than the allowance described in a below reduced by the amount in b below:

a. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement and his creditable service after he was restored to service.

b. The actuarial equivalent of the retirement benefits he previously received.

(4) As a condition to the receipt of the disability retirement allowance provided for in G.S. 135-5(d), (d1), (d2) and (d3) each member retired on a disability retirement allowance shall, on or before April 15 of each calendar year, provide the Board of Trustees with a statement of his or her income received as compensation for services, including fees, commissions or similar items, and income received from business, for the previous calendar year. Such statement shall be filed on a form as required by the Board of Trustees.

The Director of the State Retirement System shall contact any State or federal agency which can provide information to substantiate the statement required to be submitted by this subdivision and may enter into agreements for the exchange of information.

(*l*) Death Benefit Plan. — There is hereby created a Group Life Insurance Plan (hereinafter called the "Plan") which is established as an employee welfare benefit plan that is separate and apart from the Retirement System and under which the members of the Retirement System shall participate and be eligible for group life insurance benefits. Upon receipt of proof, satisfactory to the Board of Trustees in their capacity as trustees under the Group Life Insurance Plan, of the death, in service, of a member who had completed at least one full calendar year of membership in the Retirement System, there shall be paid to such person as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit. Such death benefit shall be equal to the greater of:

(1) The compensation on which contributions were made by the member during the calendar year preceding the year in which his death occurs, or

(2) The greatest compensation on which contributions were made by the member during a 12-month period of service within the 24-month period of service ending on the last day of the month preceding the month in which his last day of actual service occurs;

(3), (4) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1049, s. 2.

subject to a maximum of twenty thousand dollars ($20,000). Such death benefit shall be payable apart and separate from the payment of the member's accumulated contributions under the System on his death pursuant to the provisions of subsection (f) of this section. For the purpose of the Plan, a member shall be deemed to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service.

The death benefit provided in this subsection (*l*) shall not be payable, notwithstanding the member's compliance with all the conditions set forth in the preceding paragraph, if his death occurs

(1) After December 31, 1968 and after he has attained age 70; or

(2) After December 31, 1969 and after he has attained age 69; or

(3) After December 31, 1970 and after he has attained age 68; or

(4) After December 31, 1971 and after he has attained age 67; or

(5) After December 31, 1972 and after he has attained age 66; or

(6) After December 31, 1973 and after he has attained age 65; or

(7) After December 31, 1978 and after he has attained age 70.

Notwithstanding the above provisions, the death benefit shall be payable on account of the death of any member who died or dies on or after January 1, 1974, but before January 1, 1979, after attaining age 65, if he or she had not yet attained age 65, if he or she had not yet attained age 66, was at the time of death completing the work year for those individuals under specific contract, or during the fiscal year for those individuals not under specific contract, in which he or she attained 65, and otherwise met all conditions for payment of the death benefit.

Notwithstanding the above provisions, the Board of Trustees may and is specifically authorized to provide the death benefit according to the terms and conditions otherwise appearing in this Plan in the form of group life insurance, either (i) by purchasing a contract or contracts of group life insurance with any life insurance company or companies licensed and authorized to transact business in this State for the purpose of insuring the lives of members in service, or (ii) by establishing a separate trust fund qualified under Section 501(c)(9) of the Internal Revenue Code of 1954, as amended, for such purpose. To that end the Board of Trustees is authorized, empowered and directed to investigate the desirability of utilizing group life insurance by either of the foregoing methods for the purpose of providing the death benefit. If a separate trust fund is established, it shall be operated in accordance with rules and regulations adopted by the Board of Trustees and all investment earnings on the trust fund shall be credited to such fund.

In administration of the death benefit the following shall apply:

(1) For the purpose of determining eligibility only, in this subsection "calendar year" shall mean any period of 12 consecutive months or, if less, the period covered by an annual contract of employment. For all other purposes in this subsection "calendar year" shall mean the 12 months beginning January 1 and ending December 31.

(2) Last day of actual service shall be:

a. When employment has been terminated, the last day the member actually worked.

b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire, unless he is on approved leave of absence and is in service under the provisions of G.S. 135-4(h).

(3) For a period when a member is on leave of absence, his status with respect to the death benefit will be determined by the provisions of G.S. 135-4(h).

(4) A member on leave of absence from his position as a teacher or State employee for the purpose of serving as a member or officer of the General Assembly shall be deemed to be in service during sessions of the General Assembly and thereby covered by the provisions of the death benefit. The amount of the death benefit for such member shall be the equivalent of the salary to which the member would have been entitled as a teacher or State employee during the 12-month period immediately prior to the month in which death occurred, not to exceed twenty thousand dollars ($20,000).

The provisions of the Retirement System pertaining to Administration, G.S. 135-6, and management of funds, G.S. 135-7, are hereby made applicable to the Plan.

(m) Survivor's Alternate Benefit. — Upon the death of a member in service, the principal beneficiary designated to receive a return of accumulated contributions shall have the right to elect to receive in lieu thereof the reduced retirement allowance provided by Option 2 of subsection (g) above computed by assuming that the member had retired on the first day of the month following the date of his death, provided that all three of the following conditions apply:

(1) The member had attained such age and/or creditable service to be eligible to commence retirement with an early or service retirement allowance.

(2) The member had designated as the principal beneficiary to receive a return of his accumulated contributions one and only one person who was living at the time of his death.

(3) The member had not instructed the Board of Trustees in writing that he did not wish the provisions of this subsection to apply.

(ii) From and after July 1, 1984, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1983, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1983, in accordance with G.S. 135-5(o), plus an additional four and two-tenths percent (4.2%) of the allowance payable on July 1, 1983. (1941, c. 25, s. 5; 1945, c. 218; 1947, c. 458, ss. 3, 4, 7, 8a; 1949, c. 1056, ss. 3, 5; 1955, c. 1155, ss. 1, 2; 1957, c. 855, ss. 5-8; 1959, c. 490; c. 513, ss. 2, 3; c. 620, ss. 1-3; c. 624; 1961, c. 516, s. 4; c. 779, s. 1; 1963, c. 687, s. 3; 1965, c. 780, s. 1; 1967, c. 720, ss. 4-10; c. 1223; 1969, c. 1223, ss. 2, 5-12; 1971, c. 117, ss. 11-15; c. 118, ss. 3-7; 1973, c. 241, ss. 3-7; c. 242, ss. 2-4; c. 737, s. 2; c. 816, s. 2; c. 994, ss. 1, 3; c. 1312, ss. 1-3; 1975, c. 457, ss. 2-4; c. 511, ss. 1, 2; c. 634, ss. 1, 2; c. 875, s. 47; 1977, c. 561; c. 802, ss. 50.65-50.70; 1979, c. 838, s. 99; c. 862, ss. 1, 4, 5; c. 972, s. 4; c. 975, s. 1; 1979, 2nd Sess., c. 1137, ss. 63, 64, 66; c. 1196, s. 1; c. 1216; 1981, c. 672, s. 1; c. 689, s. 2; c. 859, ss. 42, 42.1, 44; c. 940, s. 1; c. 975, s. 3; c. 978, ss. 1, 2; c. 980, ss. 3, 4; 1981 (Reg. Sess., 1982), c. 1282, s. 11; 1983, c. 467; c. 761, ss. 218, 219, 228, 229; c. 902, s. 1; 1983 (Reg. Sess., 1984), c. 1019, s. 1; c. 1034, ss. 222, 232-235, 237; c. 1049, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1049, s. 4, provides: "No inchoate or pending right of any beneficiary in receipt of a disability retirement allowance from the Teachers' and State Employees', Local Governmental Employees', or Law Enforcement Officers' Retirement Sys-

tems, on the date of ratification of this act shall be diminished." The act was ratified July 2, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1019, effective October 1, 1984, deleted subdivision (a)(2), relating to members in service who attained age 70.

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 222, effective July 1, 1984, added subsection (ii).

The 1983 (Reg. Sess., 1984) amendment by c. 1034, ss. 232-235 and 237, effective January 1, 1985, added subdivision (a)(4), inserted subsection (b8), added the last paragraph of subsection (c), added the proviso at the end of subdivision (e)(1), and rewrote subdivision (m)(1), which read "The member had obtained age 50 with at least 20 years of creditable service, or had attained the age of 60 years with at least five years of creditable service, or had credit for at least 30 years of service regardless of age."

The 1983 (Reg. Sess., 1984) amendment by c. 1049, effective January 1, 1984, in the first paragraph of subsection (l), rewrote subdivision (2), deleted subdivisions (3) and (4), and rewrote the last sentence of that paragraph.

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Stated in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

§ 135-6. Administration.

(b) Membership of Board; Terms. — The Board shall consist of 14 members, as follows:

(1) The State Treasurer, ex officio;

(2) The Superintendent of Public Instruction, ex officio;

(3) Ten members to be appointed by the Governor and confirmed by the Senate of North Carolina. One of the appointive members shall be a member of the teaching profession of the State; one of the appointive members shall be an employee of the Board of Transportation, who shall be appointed by the Governor for a term of four years commencing April 1, 1947, and quadrennially thereafter; one of the appointive members shall be a representative of higher education appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one of the appointive members shall be a retired teacher who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one shall be a retired State employee who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1977, and quadrennially thereafter; one to be a general State employee, and three who are not members of the teaching profession or State employees; two to be appointed for a term of two years, two for a term of three years and one for a term of four years; one appointive member shall be a law-enforcement officer employed by the State, appointed by the Governor, for a term of four years commencing April 1, 1985. At the expiration of these terms of office the appointment shall be for a term of four years;

(4) Two members appointed by the General Assembly, one appointed upon the recommendation of the Speaker of the House of Representatives, and one appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Neither of these members may be an active or retired teacher or State employee or an employee

of a unit of local government. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(1941, c. 25, s. 6; 1943, c. 719; 1947, c. 259; 1957, c. 541, s. 15; 1965, c. 780, s. 1; 1969, c. 805; c. 1223, s. 17; 1973, c. 241, s. 8; c. 507, s. 5; c. 1114; 1977, c. 564; 1979, c. 376; 1981 (Reg. Sess., 1982), c. 1191, s. 11; 1983 (Reg. Sess., 1984), c. 1034, s. 238.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "14" for "13" in the introductory language of subsection (b), substituted "Nine" for "Ten" at the beginning of subdivision (b)(3), and inserted "one appointed member shall be a law-enforcement officer employed by the State, appointed by the Governor, for a term of four years commencing April 1, 1985" at the end of the second sentence of subdivision (b)(3).

CASE NOTES

Stated in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

§ 135-7. Management of funds.

CASE NOTES

Applied in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

§ 135-8. Method of financing.

CASE NOTES

Applied in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

§ 135-9. Exemption from taxes, garnishment, attachment, etc.

CASE NOTES

The language of this section is clear and unequivocal. A person's rights to state employee retirement benefits are not assignable. Reynolds v. N.C. State Employees Credit Union, 31 Bankr. 296 (Bankr. E.D.N.C. 1983).

Section 1C-1601(c) does not preclude the use of this section by a bankruptcy debtor to claim an exemption in state employee retirement benefits. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

Article 3.

Other Teacher, Employee Benefits.

Part 3. Comprehensive Major Medical Plan.

§ 135-40.1. General definitions.

As used in Parts 2 and 3 of this Article, the following terms have the meaning specified as follows:

(1) Chemical Dependency. — The term "chemical dependency" means the pathological use or abuse of alcohol or other drugs in a manner or to a degree that produces an impairment in personal, social or occupational functioning and which may, but need not, include a pattern of tolerance and withdrawal.

(1a) Covered Services. — Any necessary, reasonable, and customary items of service, at least a portion of the expense of which is covered under at least one of the plans covering the person for whom claim is made or service provided. To the extent legally possible, it shall be synonymous with allowable expenses.

(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 4, 21.1, 21.2, 21.7; 1983 (Reg. Sess., 1984), c. 1110, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, added subdivision (1), defining the term "Chemical Dependency," and designated former subdivision (1), defining the term "Covered Services," as subdivision (1a).

§ 135-40.6. Benefits subject to deductible and coinsurance (comprehensive benefits).

The following benefits are subject to a deductible of one hundred dollars ($100.00) per covered individual to an aggregate maximum of three hundred dollars ($300.00) per family per calendar year and are payable on the basis of ninety-five percent (95%) by the Plan and five percent (5%) by the covered individual up to a maximum of one hundred dollars ($100.00) out-of-pocket per calendar year:

(1) In-hospital Benefits. — The Plan pays in-hospital benefits for each single confinement, when charged by a hospital, for room accommodation, including bed, board and general nursing care, but not to exceed the charge for semiprivate room or ward accommodations.

The Plan will pay the following covered charges, when charged by a hospital, for each confinement.

a. Intensive and cardiac nursing care.

b. All recognized drugs and medicines for use in the hospital.

c. Radiation services, including diagnostic x-rays, x-ray therapy, radiation therapy and treatment.
d. Clinical and pathological laboratory examinations.
e. Electrocardiograms and electroencephalograms.
f. Physical therapy.
g. Intravenous solutions.
h. Oxygen and oxygen therapy, plus the use of equipment.
i. Dressings, ordinary splints, plaster casts and sterile supplies.
j. Use of operating, delivery, recovery and treatment rooms and equipment.
k. Routine nursery charges, if the mother is eligible to receive maternity benefits.
l. Anesthetics and the administration thereof by the hospital's employee anesthesiologist.
m. Devices or appliances surgically inserted within the body.
n. Processing and administering of blood and blood plasma.
o. Children who are born under the coverage type (2), (3), or (5), as outlined in G.S. 135-40.3(d), and who remain continuously covered are entitled to benefits for treatment of illnesses or congenital defect, incubation or isolette care, and treatment of prematurity or postmaturity.

If the mother is a covered individual, benefits are provided for the newborn's circumcision and routine nursery care.

p. When a covered individual is admitted to or transferred to a section of a hospital providing ambulant, convalescent, or rehabilitative care, benefits are provided up to the average number of days of service for treatment of the particular diagnosis or condition involved, or more if medical necessity requires.
q. The Plan pays benefits for laboratory testing and administration of blood provided to a covered individual. When a covered individual is the recipient of transplanted organs or bones, benefits are provided for services to the donor which are directly and specifically related to the transplantation.
r. Thirty days per calendar year are provided for inpatient treatment of mental illness. Readmission for this condition within 365 days of last discharge shall be considered a single confinement. When furnished to a patient in a skilled nursing facility, 30 days less the days of care already provided for the same illness in a hospital are provided. Additional inpatient treatment, based on individual consideration, may be provided if prior approval is obtained from the Plan Administrator.
s. The use of nebulizers when authorized as medically necessary by the attending physician.

(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 8-14, 21.3, 21.5, 21.9; 1983 (Reg. Sess., 1984), c. 1110, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, deleted "alcoholism and drug addiction, or any combination thereof" at the end of the first sentence of paragraph (1)r and substituted "this condition" for "any of these conditions" in the second sentence of paragraph (1)r.

§ 135-40.7A. Special provisions for chemical dependency.

(a) Except as otherwise provided in this section, benefits for treatment of chemical dependency are covered by the Plan and shall be subject to the same deductibles, durational limits, and coinsurance factors as are benefits for physical illness generally.

(b) Notwithstanding any other provision of this Part, the maximum benefit for each covered individual for treatment of chemical dependency is as follows:

30 consecutive day period	$ 3,000
calendar year	5,000
lifetime	15,000

Expenditures incurred before January 1, 1985, shall not count toward the maximum imposed by this subsection.

(c) Notwithstanding any other provision of this Part, provisions for benefits for necessary care and treatment of chemical dependency under this Part shall provide for benefit payments for the following providers of necessary care and treatment of chemical dependency:

(1) The following units of a general hospital licensed under Article 5 of General Statutes Chapter 131E:
   a. Chemical dependency units in facilities licensed after October 1, 1984;
   b. Medical units;
   c. Psychiatric units; and

(2) The following facilities licensed after July 1, 1984, under Article 1A of General Statutes Chapter 131E:
   a. Chemical dependency units in psychiatric hospitals;
   b. Chemical dependency hospitals;
   c. Residential chemical dependency treatment facilities;
   d. Social setting detoxification facilities or programs;
   e. Medical detoxification facilities or programs; and

(3) Duly licensed physicians and duly licensed practicing psychologists and certified professionals working under the direct supervision of such physicians or psychologists in facilities described in (1) and (2) above and in day/night programs or outpatient treatment facilities licensed after July 1, 1984, under Article 1A of General Statutes Chapter 122.

Provided, however, that nothing in this subsection shall prohibit the Plan from requiring the most cost effective treatment setting to be utilized by the person undergoing necessary care and treatment for chemical dependency. (1983 (Reg. Sess., 1984), c. 1110, s. 11.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 17, makes this section effective January 1, 1985.

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

ARTICLE 4.

Consolidated Judicial Retirement Act.

§ 135-50. Short title and purpose.

(a) This Article shall be known and may be cited as the "Consolidated Judicial Retirement Act."

(b) The purpose of this Article is to improve the administration of justice by attracting and retaining the most highly qualified talent available within the State to the positions of justice and judge, district attorney and solicitor, and clerk of superior court, within the General Court of Justice. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, ss. 2, 3.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1031, ss. 24 and 25, provide:

"Sec. 24. Article 4A and 4B of Chapter 135 of the General Statutes are repealed and the assets and liabilities of the former Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems shall be transferred to the Consolidated Judicial Retirement System in the amounts calculated and in order of precedence as follows: (1) the accumulated contributions of members of the former Systems shall be transferred from the annuity savings funds of the former Systems to the annuity savings fund of the Consolidated Judicial Retirement System to the credit of each individual member; and, (2) all reserves held in the pension accumulation funds of the former Systems shall be transferred to the pension accumulation fund of the Consolidated Judicial Retirement System.

"Sec. 25. Any and all accrued or inchoate rights of members and beneficiaries of the former Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems shall, from and after the effective date of this act, be transferred to the Consolidated Judicial Retirement System and all benefits and allowances shall be payable by the Consolidated Judicial Retirement System."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "Consolidated Judicial Retirement Act" for "Uniform Judicial Retirement Act of 1973" in subsection (a) and rewrote subsection (b). The act also changed the title of this Article.

§ 135-51. Scope.

(a) This Article provides consolidated retirement benefits for all justices and judges, district attorneys, and solicitors who are serving on January 1, 1974, and who become such thereafter; and for all clerks of superior court who are so serving on January 1, 1975, and who become such thereafter.

(b) For justices and judges of the appellate and superior court divisions of the General Court of Justice who so served prior to January 1, 1974, the provisions of this Article supplement and, under certain circumstances, replace the provisions of Articles 6 and 8, as the case may be, of Chapter 7A of the General Statutes.

For district attorneys and judges of the district court of the General Court of Justice who so served prior to January 1, 1974, the provisions of this Article supplement and, under certain circumstances, replace the provisions of Article 1 of this Chapter.

For clerks of superior court of the General Court of Justice who so served prior to January 1, 1975, the provisions of this Article supplement and, under certain circumstances, replace the provisions of Article 1 of this Chapter.

(c) The retirement benefits of any person who becomes a justice or judge, district attorney, or solicitor on and after January 1, 1974, or clerk of superior court on and after January 1, 1975, shall be determined solely in accordance with the provisions of this Article. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 4.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, rewrote this section.

§ 135-53. Definitions.

The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(4a) "Clerk of superior court" shall mean the clerk of superior court provided for in G.S. 7A-100(a).

(5) "Compensation" shall mean all salaries and wages derived from public funds which are earned by a member of the Retirement System for his service as a justice or judge, or district attorney, or clerk of superior court.

(6a) "District attorney" shall mean the district attorney or solicitor provided for in G.S. 7A-60.

(12) "Membership service" shall mean service as a judge, district attorney, or clerk of superior court rendered while a member of the Retirement System.

(13) "Previous system" shall mean, with respect to any member, the retirement benefit provisions of Article 6 and Article 8 of Chapter 7A of the General Statutes, to the extent that such Article or Articles were formerly applicable to the member, and in the case of judges of the district court division, and district attorney, and clerk of superior court of the General Court of Justice, the Teachers' and State Employees' Retirement System.

(18) "Retirement System" shall mean the "Consolidated Judicial Retirement System" of North Carolina, as established in this Article.

(1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, ss. 5-10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, added subdivision (4a), inserted "or district attorney, or clerk of superior court" in subdivision (5), added subdivision (6a), rewrote subdivision (12), inserted "and district attorney, and clerk of superior court" in subdivision (13), and substituted "Consolidated Judicial Retirement System" for "Uniform Judicial Retirement System" in subdivision (18).

§ 135-54. Name and date of establishment.

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Article for justices and judges, district attorneys, and clerks of superior court of the General Court of Justice of North Carolina, and their survivors. The Retirement System so created shall be established as of January 1, 1974.

The Retirement System shall have the power and privileges of a corporation and shall be known as the "Consolidated Judicial Retirement System of North Carolina," and by such name all of its business shall be transacted. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 11.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, inserted "district attorneys, and clerks of superior court" in the first paragraph and substituted "Consolidated" for "Uniform" in the second paragraph.

§ 135-55. Membership.

(a) The membership of the Retirement System shall consist of:
(1) All judges and district attorneys in office on January 1, 1974;
(2) All persons who become judges and district attorneys or reenter service as judges and district attorneys after January 1, 1974;
(3) All clerks of superior court in office on January 1, 1975; and
(4) All persons who become clerks of superior court or reenter service as clerks of superior court after January 1, 1975.

(b) The membership of any person in the Retirement System shall cease upon:
(1) The withdrawal of his accumulated contributions after he is no longer a judge, district attorney or clerk of superior court, or
(2) His retirement under the provisions of the Retirement System, or
(3) His death. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, ss. 12, 13.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, inserted "and district attorneys" in subdivisions (a)(1) and (a)(2), deleted "and" at the end of subdivision (a)(1), substituted a semicolon for a period at the end of subdivision (a)(2), inserted subdivisions (a)(3) and (a)(4), and inserted "district attorney or clerk of superior court" in subdivision (b)(1).

§ 135-56. Creditable service.

(a) Subject to such rules and regulations as the Board of Trustees shall adopt with regard to the verification of a judge's prior service, the prior service of a judge shall consist of his service rendered prior to January 1, 1974, as a justice of the Supreme Court, judge of the Court of Appeals, judge of the superior court, judge of the district court division of the General Court of Justice, as administrative officer of the courts, or as a solicitor or district attorney.

(c) On and after January 1, 1984, the creditable service of a member who was a member of the former Uniform Solicitorial or Uniform Clerks of Superior Court Retirement Systems at the time of merger of those Systems into this Consolidated Judicial Retirement System and whose accumulated contributions are transferred from those Systems to this System, includes service that was creditable in the Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems; and membership service with those Retirement Systems is membership service with this Retirement System.

(d) Any member may purchase creditable service for service as a judge, district attorney, or clerk of superior court, when not otherwise provided for in this section, and as a judge of any lawfully constituted court of this State inferior to the superior court, not to include service as a magistrate, justice of the peace or mayor's court judge. The member, after the transfer of any accumulated contributions from the Teachers' and State Employees' Retirement System or Local Governmental Employees' Retirement System, shall pay an amount equal to the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire with an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary. (1973, c. 640, s. 1; 1977, c. 936; 1983 (Reg. Sess., 1984), c. 1031, ss. 14, 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "judge's" for "member's" and

"judge" for "member" in subsection (a) and added subsections (c) and (d).

§ 135-56.1: Repealed by Session Laws 1983 (Regular Session 1984), c. 1031, s. 16, effective January 1, 1985.

§ 135-56.2. Creditable service for other employment.

Any member may purchase creditable service for service as a State teacher or employee, as defined under G.S. 135-1(10) and (25), and for service as an employee of local government, as defined under G.S. 128-21(10). The member, after the transfer of any accumulated contributions from the Teachers' and State Employees' Retirement System or Local Governmental Employees' Retirement System, shall pay an amount equal to the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the Retirement System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire with an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee as set by the Board of Trustees. (1983 (Reg. Sess., 1984), c. 1041.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1041, s. 2, makes this section effective July 1, 1984.

§ 135-58. Service retirement benefits.

(a) Any member who retires under the provisions of subsection (a) or subsection (c) of G.S. 135-57 after he either has attained his sixty-fifth birthday or has completed 24 years or more of creditable service shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of his retirement and shall be continued on the first day of each month thereafter during his lifetime, the amount of which shall be computed as the sum of (1), (2) and (3) following, provided that in no event shall the annual allowance payable to any member be greater than an amount which, when added to the allowance, if any, to which he is entitled under the Teachers' and State Employees' Retirement System or the North Carolina Local Governmental Employees' Retirement System (prior in any case to any reduction for early retirement or for an optional mode of payment) would total three fourths of his final compensation:

(1) Four percent (4%) of his final compensation, multiplied by the number of years of his creditable service rendered as a justice of the Supreme Court or judge of the Court of Appeals;

(2) Three and one-half percent (3½%) of his final compensation, multiplied by the number of years of his creditable service rendered as a judge of the superior court or as administrative officer of the courts;

(3) Three percent (3%) of his final compensation, multiplied by the number of years of his creditable service rendered as a judge of the district court, district attorney, or clerk of superior court.

(b) Any member who retires under the provisions of subsection (a) or subsection (c) of G.S. 135-57 before he either has attained his sixty-fifth birthday or has completed 24 years of creditable service shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of his

retirement and shall be continued on the first day of each month thereafter during his lifetime, the amount of which shall be determined in the same manner and be subject to the same maximum limitation as provided for in subsection (a) above except that the allowance so computed shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which the member's retirement date precedes the first day of the month coincident with or next following the earlier of

(1) The member's sixty-fifth birthday or

(2) The date the member would have completed 24 years of creditable service if he had been in membership service from his retirement date until such date.

For the sole purpose of determining whether a member has completed the required 24 years of creditable service referred to in this subsection (b) or the date on which he would have completed such period of creditable service if he had remained in membership service, in the case of a member of the Teachers' and State Employees' Retirement System who became a member of this Retirement System under circumstances described in G.S. 135-28.1, and who at the time of his retirement hereunder is in service and has retained his membership in the Teachers' and State Employees' Retirement System as provided for in G.S. 135-28.1, his creditable service shall be taken as the sum of his creditable service hereunder plus the amount of creditable service remaining to his credit in such other system as provided for in G.S. 135-28.1.

(c) The foregoing subsections of this section to the contrary notwithstanding, in no event will the retirement allowance payable at any time to a retired member who was a member of a previous system immediately prior to January 1, 1974, prior to any reduction of such allowance in accordance with G.S. 135-61, be less than the retirement allowance to which he would have been entitled under the terms of such previous system if this Article had not been enacted.

(e) Notwithstanding any other provision to the contrary, in no event will the retirement allowance payable at any time to a retired member who was a member of a previous system immediately prior to January 1, 1974, prior to any reduction of such allowance in accordance with G.S. 135-61, be greater than the retirement allowance to which he would have been entitled under the terms of such previous system if this Article had not been enacted or than the retirement allowance to which he would have been entitled under this Article if he had not been entitled to benefits under the terms of such previous system, whichever is larger. (1973, c. 640, s. 1; 1977, c. 1120, s. 2; 1983 (Reg. Sess., 1984), c. 1031, ss. 17, 18; c. 1109, ss. 13.14, 13.15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1031, effective January 1, 1985, rewrote subdivision (a)(3), which read "In addition to time served as a district court judge of the General Court of Justice, creditable service shall also include prior creditable service as provided in G.S. 135-56," and substituted "in membership service" for "in service as a judge" in subdivision (b)(2) and in the last sentence of subsection (b).

The 1983 (Reg. Sess., 1984) amendment by c. 1109, effective July 1, 1984, substituted "payable at any time to a retired member" for "initially payable upon the retirement of any member" in subsection (c) and added subsection (e).

CASE NOTES

Differential in percentages used to calculate retirement benefits does not violate the equal protection clause of U.S. Const., Amend. 14. The objectives sought by the legislature to be obtained from the present retirement system are valid, and the method chosen is reasonably calculated to achieve that end. Gentry v. Uniform Judicial Retirement Sys., 378 F. Supp. 1 (M.D.N.C. 1974).

§ 135-60. Disability retirement benefits.

(a) Upon retirement for disability in accordance with G.S. 135-59, a member shall receive a disability retirement allowance computed and payable as provided for service retirement in G.S. 135-58(a) except that the member's creditable service shall be taken as the creditable service he would have had had he continued in service to the earliest date he could have retired on an unreduced service retirement allowance as a member in the same division of the General Court of Justice in which he was serving on his disability retirement date.

(1973, c. 640, s. 1; 1981, c. 975, s. 4; c. 980, s. 5; 1983 (Reg. Sess., 1984), c. 1031, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "member" for "judge" following "unreduced service retirement allowance as a" near the end of subsection (a).

§ 135-62. Return of accumulated contributions.

(a) Should a member cease membership service otherwise than by death or retirement under the provisions of this Article, he shall, upon submission of an application, be paid, not earlier than 60 days from the date of termination of service, his contributions and, if he has attained at least five years of membership service or if termination of his membership service is involuntary as certified by the employer, the accumulated regular interest thereon, provided that he has not in the meantime returned to service as a judge. Upon payment of such accumulated contributions his membership in the Retirement System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered, except as otherwise provided in G.S. 135-56(b). Any such payment of a member's accumulated contributions shall be in full and complete discharge of any rights in or to any benefits otherwise payable under this Article.

(b) Any other provision of this Article to the contrary notwithstanding, there shall be deducted from any amount otherwise payable hereunder any amount due any agency or subdivision of the State by the member by reason of any outstanding overpayment of salary or by reason of the embezzlement of fees collected by the member for any agency or subdivision of the State; provided that, notwithstanding any other provisions of this Article, even if the member fails to demand the return of his accumulated contributions within 90 days from the day he ceases membership service, any amount due such agency or subdivision by reason of any outstanding overpayment of salary or embezzlement of fees shall be paid to such agency or subdivision by the Retirement System upon demand; and provided further, that such agency or subdivision shall have notified the director of any amount so due and that the Retirement System shall have no liability for amounts so deducted and transmitted to such agency or subdivision nor for any failure by the Retirement System for any

reason to make such deductions. (1973, c. 640, s. 1; 1981, c. 672, s. 4; 1983, c. 467; 1983 (Reg. Sess., 1984), c. 1031, s. 20.)

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "membership service" for "to be a judge" in subsections (a) and (b).

§ 135-65. Post-retirement increases in allowances.

(e) Increase in Benefits Paid to Members Retired on or before July 1, 1983. — From and after July 1, 1984, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1983, shall be increased by eight percent (8.0%) of the allowance payable on July 1, 1983. (1973, c. 640, s. 1; 1979, c. 838, s. 104; 1979, 2nd Sess., c. 1137, s. 69; 1983, c. 761, s. 221; 1983 (Reg. Sess., 1984), c. 1034, s. 224.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.
Editor's Note. —
Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.
Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added subsection (e).

§ 135-70. Transfer of members to another system.

(a) Any member whose membership service is terminated other than by retirement or death and, who, while still a member of this Retirement System becomes a member of either the Teachers' and State Employees' Retirement System or the North Carolina Local Governmental Employees' Retirement System, may elect to retain his membership in this Retirement System by not withdrawing his accumulated contributions hereunder. Any such member shall retain all the rights, credits and benefits obtaining to him under this Retirement System at the time of such termination of service while he is a member of such other system and does not withdraw his contributions hereunder.
(1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.
Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "whose membership service" for "whose service as a judge" near the beginning of subsection (a).

§ 135-71. (Effective until September 1, 1985) Return to membership of retired former member.

(a) In the event that a retired former member should at any time return to membership service, his retirement allowance shall thereupon cease and he shall be restored as a member of the Retirement System.
(b) In the computation of the amount of any benefits to which he may subsequently become entitled under any of the provisions of this Article, his creditable service shall be taken as the sum of the creditable service rendered by him prior to the date of his previous retirement plus the period of membership service rendered by him subsequent to his restoration to membership, except as otherwise provided in G.S. 135-60(c). (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 22.)

§ 135-71 is set out twice. See section heading for effective dates.

Section Set Out Twice. — The section above is effective until September 1, 1985. For this section as amended effective September 1, 1985, see the following section, also numbered § 135-71.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "return to membership service" for "return to service as a justice or judge" near the beginning of subsection (a).

§ 135-71. (Effective September 1, 1985) Return to membership of retired former member.

(a) In the event that a retired former member should at any time return to membership service, his retirement allowance shall thereupon cease and he shall be restored as a member of the Retirement System.

(b) In the computation of the amount of any benefits to which he may subsequently become entitled under any of the provisions of this Article, his creditable service shall be taken as the sum of the creditable service rendered by him prior to the date of his previous retirement plus the period of membership service rendered by him subsequent to his restoration to membership, except as otherwise provided in G.S. 135-60(c).

(c) Notwithstanding any other provision in this Chapter, the retirement allowance of a justice or judge shall not be affected by the compensation received as an emergency justice or judge. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 22; c. 1106, s. 3.)

Section Set Out Twice. — The section above is effective September 1, 1985. For this section as in effect until September 1, 1985, see the preceding section, also numbered § 135-71.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment by c. 1031, effective January 1, 1985, substituted "return to membership service" for "return to service as a justice or judge" near the beginning of subsection (a).

The 1983 (Reg. Sess., 1984) amendment by c. 1106, effective September 1, 1985, and not applicable to agreements entered into before the effective date of the act, added subsection (c).

§ 135-72. Benefits of members appointed to serve in United States courts.

(a) Members who are appointed to serve as a judicial officer in the United States courts shall not be eligible for benefits under this Article while actively serving as a judicial officer in the United States courts.

(b) Should a retired former member be appointed to serve as a judicial officer in the United States courts or be in receipt of a retirement allowance from service as a judicial officer in the United States courts, his retirement allowance provided under the provisions of this Article shall be reduced so that the sum of his retirement allowance and the salary or retirement allowance from service as a judicial officer in the United States courts does not exceed the salary for the office last held by the retired member in the General Court of Justice of North Carolina. Provided, however, that under no circumstances will the retired member's retirement allowance be reduced below the amount of his annuity resulting from his accumulated contributions. (1981, c. 978, s. 7; 1983 (Reg. Sess., 1984), c. 1031, s. 23.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "as a judicial officer" for "as a justice, judge or magistrate" throughout this section.

§ 135-71 is set out twice. See section heading for effective dates.

ARTICLE 4A.

Uniform Solicitorial Retirement Act of 1974.

§§ 135-77 to 135-83: Repealed by Session Laws 1983 (Regular Session 1984), c. 1031, s. 24, effective January 1, 1985.

Cross References. — For the Consolidated Judicial Retirement Act, see now § 135-50 et seq.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1031, ss. 24 and 25, provide:

"Sec. 24. Article 4A and 4B of Chapter 135 of the General Statutes are repealed and the assets and liabilities of the former Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems shall be transferred to the Consolidated Judicial Retirement System in the amounts calculated and in order of precedence as follows: (1) the accumulated contributions of members of the former Systems shall be transferred from the annuity savings funds of the former Systems to the annuity savings fund of the Consolidated Judicial Retirement System to the credit of each individual member; and, (2) all reserves held in the pension accumulation funds of the former Systems shall be transferred to the pension accumulation fund of the Consolidated Judicial Retirement System.

"Sec. 25. Any and all accrued or inchoate rights of members and beneficiaries of the former Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems shall, from and after the effective date of this act, be transferred to the Consolidated Judicial Retirement System and all benefits and allowances shall be payable by the Consolidated Judicial Retirement System."

ARTICLE 4B.

Uniform Clerks of Superior Court Retirement Act of 1975.

§§ 135-84 to 135-86: Repealed by Session Laws 1983 (Regular Session 1984), c. 1031, s. 24, effective January 1, 1985.

Cross Reference. — For the Consolidated Judicial Retirement Act, see now § 135-50 et seq.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1031, ss. 24 and 25, provide:

"Sec. 24. Article 4A and 4B of Chapter 135 of the General Statutes are repealed and the assets and liabilities of the former Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems shall be transferred to the Consolidated Judicial Retirement System in the amounts calculated and in order of precedence as follows: (1) the accumulated contributions of members of the former Systems shall be transferred from the annuity savings funds of the former Systems to the annuity savings fund of the Consolidated Judicial Retirement System to the credit of each individual member; and, (2) all reserves held in the pension accumulation funds of the former Systems shall be transferred to the pension accumulation fund of the Consolidated Judicial Retirement System.

"Sec. 25. Any and all accrued or inchoate rights of members and beneficiaries of the former Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems shall, from and after the effective date of this act, be transferred to the Consolidated Judicial Retirement System and all benefits and allowances shall be payable by the Consolidated Judicial Retirement System."

ARTICLE 5.

Supplemental Retirement Income Act of 1984.

§ 135-90. Short title and purpose.

(a) This Article shall be known and may be cited as the "Supplemental Retirement Income Act of 1984".

(b) The purpose of the Article is to attract and hold qualified employees and officials of the State of North Carolina and its political subdivisions by permitting them to participate in a profit sharing or salary reduction form of deferred compensation which will provide supplemental retirement income payments upon retirement, disability, termination, hardship, and death as allowed under Section 401(k), or any other relevant section, of the Internal Revenue Code of 1954 as amended. As used in this Article, the term "profit" means the excess revenue over expenditures prior to the expenditure of the amount which may be optionally made available for employees to be placed in trust by the State and its political subdivisions on behalf of the employees and officials covered by this Article. (1983 (Reg. Sess., 1984), c. 975.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 975, s. 2, makes this Article effective upon ratification. The act was ratified June 26, 1984.

§ 135-91. Administration.

(a) The provisions of this Article shall be administered by the Department of State Treasurer and a Board of Trustees consisting of the Board of Trustees of the Teachers' and State Employees' Retirement System and the Board of Trustees of the Local Governmental Employees' Retirement System. The Department of State Treasurer and the Board of Trustees shall create a Supplemental Retirement Income Plan as of January 1, 1985, to be administered under the provisions of this Article.

(b) The Supplemental Retirement Income Plan shall have the power and privileges of a corporation and shall be known as the "Supplemental Retirement Income Plan of North Carolina" and by this name all of its business shall be transacted.

(c) The Department of State Treasurer and the Board of Trustees shall have full power and authority to adopt rules and regulations for the administration of the Plan, provided they are not inconsistent with the provisions of this Article. The Department of State Treasurer and Board of Trustees may appoint those agents, contractors, employees and committees as they deem advisable to carry out the terms and conditions of the Plan.

(d) The Department of State Treasurer and the Board of Trustees shall be charged with a fiduciary responsibility for managing all aspects of the Plan, including the receipt, maintenance, investment, and disposition of all Plan assets.

(e) The administrative costs of the Plan may be charged to members or deducted from members' accounts in accordance with nondiscriminatory procedures established by the Department of State Treasurer and Board of Trustees. (1983 (Reg. Sess., 1984), c. 975.)

§ 135-92. Membership.

(a) The membership eligibility of the Supplemental Retirement Income Plan shall consist of any of the following who voluntarily elect to enroll:

(1) Members of the Teachers' and State Employees' Retirement System; and

(2) Members of the Uniform Judicial, Solicitorial and Clerks of Superior Court Retirement Systems; and

(3) Members of the Legislative Retirement System; and

(4) Members of the Local Governmental Employees' Retirement System; and

(5) Members of the Law Enforcement Officers' Retirement System.

(b) The membership of any person in the Supplemental Retirement Income Plan shall cease upon:

(1) The withdrawal of a member's accumulated account; or

(2) Retirement under the provisions of the Supplemental Income Retirement Plan; or

(3) Death. (1983 (Reg. Sess., 1984), c. 975.)

§ 135-93. Contributions.

(a) Each member may elect to reduce his compensation by the amount of his contribution to the Supplemental Retirement Income Plan and that amount shall be held in the member's account. Members electing such a reduction in compensation may authorize payroll deductions for making contributions to the Plan.

(b) The State and any of its political subdivisions may make contributions to the Supplemental Retirement Income Plan on behalf of any of its members, provided these contributions are nondiscriminatory in accordance with the Internal Revenue Code of 1954 as amended, and are duly appropriated by their governing bodies, and the contributions are held in the member's account. Employer contributions to the Plan are declared expenditures for a public purpose.

(c) The Department of State Treasurer and Board of Trustees shall establish maximum annual additions that may be made to a member's account and provide for multiple plan reductions in accordance with the Internal Revenue Code of 1954 as amended. (1983 (Reg. Sess., 1984), c. 975.)

§ 135-94. Benefits.

(a) The Department of State Treasurer and the Board of Trustees shall establish a schedule of supplemental retirement income benefits for all members of the Supplemental Retirement Income Plan, subject to the following limitations:

(1) The balance in each member's account shall be fully vested at all times and shall not be subject to forfeiture for any reason.

(2) All amounts maintained in a member's account shall be invested according to the member's election, as approved by the Department of State Treasurer and Board of Trustees, including but not limited to, a time deposit account, a fixed investment account, or a variable investment account. Transfers of accumulated funds shall be permitted among the various approved forms of investment.

(3) The Department of State Treasurer and Board of Trustees shall provide members with alternative payment options, including survivors' options, for the distribution of benefits from the Plan upon retirement, disability, termination, hardship, and death.

(4) With the consent of the Department of State Treasurer and the Board of Trustees, amounts may be transferred from other qualified plans to the Supplemental Retirement Income Plan, provided that the trust from which such funds are transferred permits the transfer to be made and, the transfer will not jeopardize the tax status of the Supplemental Retirement Income Plan or create adverse tax consequences for the State.

(5) At the discretion of the Department of State Treasurer and Board of Trustees, a loan program may be implemented for members which complies with applicable State and federal laws and regulations.

(b) All provisions of the Plan shall be interpreted and applied by the Department of State Treasurer and Board of Trustees in a uniform and nondiscriminatory manner.

(c) All benefits under the Plan shall become payable on and after January 1, 1985.

(d) Contributions under the Plan may be made on and after January 1, 1985. (1983 (Reg. Sess., 1984), c. 975.)

§ 135-95. Exemption from taxes, garnishment, attachment.

The right of a member in the Supplemental Retirement Income Plan to the benefits provided under this Article is nonforfeitable and exempt from levy, sale, garnishment, and the benefits payable under this Article are hereby exempt from any State and local government taxes. (1983 (Reg. Sess., 1984), c. 975.)

Chapter 136.

Roads and Highways.

Article 1.

Organization of Department of Transportation.

Sec.

136-4. (Effective July 1, 1985) State Highway Administrator.

Article 2.

Powers and Duties of Department and Board of Transportation.

136-18.5. Wesley D. Webster Highway.
136-27.1. Relocation of water lines of municipalities and nonprofit water corporations and associations.
136-42.3. Historical marker program.

Article 3A.

Streets and Highways in and around Municipalities.

136-66.7. Authority to include a Municipal Street System street in right-of-way of State Highway System.

Article 1.

Organization of Department of Transportation.

§ 136-4. (Effective July 1, 1985) State Highway Administrator.

There shall be a State Highway Administrator, who shall be a career official and who shall be the administrative officer of the Department of Transportation for highway matters. The State Highway Administrator shall be appointed by the Secretary of Transportation and he may be removed at any time by the Secretary of Transportation. He shall be paid a salary fixed by the General Assembly in the Current Operations Appropriations Act. The State Highway Administrator shall have such powers and perform such duties as the Secretary of Transportation shall prescribe. (1921, c. 2, ss. 5, 6; C.S., s. 3846(g); 1933, c. 172, s. 17; 1957, c. 65, s. 2; 1961, c. 232, s. 2; 1965, c. 55, s. 3; 1973, c. 507, s. 22; 1975, c. 716, s. 7; 1977, c. 464, s. 11; 1983, c. 717, s. 45; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 2.

Powers and Duties of Department and Board of Transportation.

§ 136-18. Powers of Department of Transportation.

CASE NOTES

Applied in Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

§ 136-18.5. Wesley D. Webster Highway.

State Highway 704 shall be known as the "Wesley D. Webster Highway". (1983 (Reg. Sess., 1984), c. 974.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 974, s. 2, makes this section effective June 26, 1984.

§ 136-27.1. Relocation of water lines of municipalities and nonprofit water corporations and associations.

The Department of Transportation shall pay the nonbetterment cost for the relocation of water lines, located within the existing State highway right-of-way, which are necessary to be relocated for a State highway improvement project and which are owned by: (1) a municipality with a population of 5,000 or less according to the latest decennial census; or (2) a nonprofit water association or corporation. (1983 (Reg. Sess., 1984), c. 1090.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1090, s. 3, makes this section effective July 1, 1984. Section 2 provides that the act shall apply to State highway improvement projects let to contract after the effective date.

§ 136-28.1. Letting of contracts to bidders after advertisement; exceptions.

CASE NOTES

Quoted in Allan Miles Cos. v. North Carolina Dep't of Transp., — N.C. App. —, 314 S.E.2d 576 (1984).

§ 136-29. Adjustment of claims.

CASE NOTES

Section Does Not Offend Constitutional Right to Jury. — The constitutional guarantee of trial by jury applies only where the prerogative existed at common law or by statute at the time the Constitution was adopted. Prior to the enactment of this statute, and certainly at common law, a contractor could not institute this action against the State due to the doctrine of sovereign immunity. The right itself was created by this statute which never intended nor provided for a trial by jury. Therefore, the statute does not offend the constitutional guarantee to trial by jury. Huyck Corp. v. C.C. Mangum, Inc., 309 N.C. 788, 309 S.E.2d 183 (1983).

Administrative Remedies Must First Be Pursued. — Before a party may pursue a judicial action against the state for money claimed to be due under a highway construction contract, it must first pursue its administrative remedies. Huyck Corp. v. C.C. Mangum, Inc., 309 N.C. 788, 309 S.E.2d 183 (1983).

Applied in Allan Miles Cos. v. North Carolina Dep't of Transp., — N.C. App. —, 314 S.E.2d 576 (1984).

§ 136-42.3. Historical marker program.

The Department of Transportation may spend up to forty thousand dollars ($40,000) a year to purchase historical markers prepared and delivered to it by the Department of Cultural Resources. The Department of Transportation shall erect the markers on sites selected by the Department of Cultural Resources. This expenditure is hereby declared to be a valid expenditure of State highway maintenance funds. No provision in this section shall be construed to prevent the expenditure of any federal highway funds that may be available for this purpose. (1935, c. 197; 1943, c. 237; 1951, c. 766; 1955, c. 543, s. 2; 1957, c. 65, s. 11; 1971, c. 345, s. 2; 1973, c. 476, s. 48; c. 507, s. 5; 1977, c. 464, s. 7.1; 1983 (Reg. Sess., 1984), c. 1034, s. 129.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted the present first and second sentences for a first sentence, which read "The Department of Transportation is hereby authorized to expend not more than ten thousand dollars ($10,000) a year for the purpose of purchasing historical markers, to be erected by the Department of Transportation on sites selected by the Department of Cultural Resources which Department shall also prepare the inscriptions and deliver the completed markers to the Department of Transportation."

ARTICLE 2A.

State Roads Generally.

§ 136-44.5. Secondary roads; mileage study; allocation of funds.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 200, allocates funds to the 14 Highway Divisions for urban construction projects and also allocates additional funds to the Highway Divisions for urban and rural projects upon determination by the Office of State Budget that funds are available. The section further provides that any funds transferred for Division rural road construction shall not be subject to the county formula allocation as provided by § 136-44.5. Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

ARTICLE 3A.

Streets and Highways in and around Municipalities.

§ 136-66.1. Responsibility for streets inside municipalities.

CASE NOTES

Reasons for Deletion of Street from State Highway System. — When read together, this section and §§ 136-66.2 and 136-66.3 indicate that a municipal street or road is included within the State highway system because it possesses certain characteristics that distinguish it from other streets in the municipality. From the language in the applicable statutes,

these characteristics relate primarily to the function served by the particular street. In contrast, public roads not within municipalities are part of the State highway system not because of their function, but because of their geographic location outside the corporate limits of a municipality. Thus, there is a qualitative distinction between roads which are a part of the State highway system because they are not within a municipality and roads which are in a municipality but are nevertheless part of the State highway system because of the function they serve. It follows logically that the reasons justifying deletion of a street from the State system and incorporating it into a municipality system will vary according to the reasons why it was in the State system to begin with. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

§ 136-66.2. Development of a coordinated street system.

CASE NOTES

Reasons for Deletion of Street from State Highway System. — When read together, this section and §§ 136-66.1 and 136-66.3 indicate that a municipal street or road is included within the State highway system because it possesses certain characteristics that distinguish it from other streets in the municipality. From the language in the applicable statutes, these characteristics relate primarily to the function served by the particular street. In contrast, public roads not within municipalities are part of the State highway system not because of their function, but because of their geographic location outside the corporate limits of a municipality. Thus, there is a qualitative distinction between roads which are a part of the State highway system because they are not within a municipality and roads which are in a municipality but are nevertheless part of the State highway system because of the function they serve. It follows logically that the reasons justifying deletion of a street from the State system and incorporating it into a municipality system will vary according to the reasons why it was in the State system to begin with. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

§ 136-66.3. Acquisition of rights-of-way.

CASE NOTES

Section does not apply to streets within municipalities that are not part of the State highway system or that have been properly deleted therefrom. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

Reasons for Deletion of Street from State Highway System. — When read together, this section and §§ 136-66.1 and 136-66.2 indicate that a municipal street or road is included within the State highway system because it possesses certain characteristics that distinguish it from other streets in the municipality. From the language in the applicable statutes, these characteristics relate primarily to the function served by the particular street. In contrast, public roads not within municipalities are part of the State highway system not because of their function, but because of their geographic location outside the corporate limits of a municipality. Thus, there is a qualitative distinction between roads which are a part of the State highway system because they are not within a municipality and roads which are in a municipality but are nevertheless part of the State highway system because of the function they serve. It follows logically that the reasons justifying deletion of a street from the State system and incorporating it into a municipality system will vary according to the reasons why it was in the State system to begin with. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

City's Request for Deletion of Road from System Presumed in Good Faith. — Since a city's request for the deletion of a road from the State highway system is a discretionary act, the city is presumed to have acted in good faith. Good faith in this context requires the city to furnish to the Board of Transportation sufficient information to allow it to make a proper decision. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

§ 136-66.7. Authority to include a Municipal Street System street in right-of-way of State Highway System.

(a) Notwithstanding any other provisions of Article 3A of Chapter 136, the provisions of Article 15 of Chapter 160A, or of any other statute, the Department of Transportation may include all or part of a Municipal Street System street as part of the right-of-way of a State Highway System street, highway, or bridge whenever the Board of Transportation determines that inclusion of the Municipal Street System street is necessary to improve, relocate, or construct a State Highway System street, highway, or bridge.

(b) Beginning January 1, 1985, the Department may not exercise such authority unless 90 days written notice to the governing body of the affected municipality is provided; and the Department shall hold a public hearing on the issue with 30 days published notice upon the written official request of the governing body received by the Department no less than 45 days after receipt of the notice to the governing body. (1983 (Reg. Sess., 1984), c. 1020.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1020, s. 2, makes this section effective upon ratification. The act was ratified June 28, 1984.

Article 9.

Condemnation.

§ 136-103. Institution of action and deposit.

CASE NOTES

Legislative Intent. — Section 136-112 clarifies the legislative intent behind this section. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

Issue of Damages Considered De Novo on Appeal. — An appeal to superior court from a condemnation proceeding puts the issue of compensation for damages resulting from the taking before the court de novo. Metropolitan Sewerage Dist. v. Trueblood, 64 N.C. App. 690, 308 S.E.2d 340 (1983).

Applied in City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

Stated in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

§ 136-104. Vesting of title and right of possession; recording memorandum or supplemental memorandum of action.

CASE NOTES

But such person has nothing, etc. — In accord with original. See State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

§ 136-108. Determination of issues other than damages.

CASE NOTES

The State's right to exercise the power of eminent domain is limited by the constitutional requirements of due process and the payment of just compensation for property condemned. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

A determination of ownership of the area affected is a prerequisite to a determination of just compensation for the area taken. Limiting the trial court's factfinding to ownership of the area taken alone would deprive the defendants of just compensation. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

A valid exercise of the power of eminent domain presupposes a complete determination of the area affected, including ownership. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

Cited in Frander v. Board of Transp., — N.C. App. —, 311 S.E.2d 308 (1984).

§ 136-111. Remedy where no declaration of taking filed; recording memorandum of action.

CASE NOTES

Inverse Condemnation. — Property owners need not seek to recover compensation in ongoing condemnation proceedings for a subsequent further taking by the State. Property owners may choose to bring a separate action for inverse condemnation pursuant to this section when there is a further taking by the State after the initiation of the original condemnation action. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

When choosing to bring a separate action for inverse condemnation, the property owners will not be entitled to damages which are merely a consequence of the taking in the prior condemnation action. Injuries accruing to the remaining property caused by the original taking by condemnation, including injuries resulting from the condemnor's use of the previously taken portion, are not compensible in an inverse condemnation action unless they are so great as to amount in themselves to a separate taking. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

§ 136-112. Measure of damages.

CASE NOTES

I. GENERAL CONSIDERATION.

Legislative Intent. — This section clarifies the legislative intent behind § 136-103. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

The State's right to exercise the power of eminent domain is limited by the constitutional requirements of due process and the payment of just compensation for property condemned. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

A determination of ownership of the area affected is a prerequisite to a determination of just compensation for the area taken. Limiting the trial court's factfinding to ownership of the area taken alone would deprive the defendants of just compensation. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

A valid exercise of the power of eminent domain presupposes a complete determination of the area affected, including ownership. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

Inverse Condemnation. — Property owners need not seek to recover compensation in ongoing condemnation proceedings for a subsequent further taking by the State. Property owners may choose to bring a separate action for inverse condemnation pursuant to section 136-111 when there is a further taking by the

State after the initiation of the original condemnation action. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

When trial on the issue of damages in the initial condemnation action has not yet occurred, principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in ongoing proceedings. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

Cited in Frander v. Board of Transp., — N.C. App. —, 311 S.E.2d 308 (1984).

II. DAMAGES WHERE PART OF TRACT TAKEN.

In General. —

The measure of damages to be used in condemnation cases in which the state does not take the plaintiff's property in its entirety is mandated by this section to be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking less any special or general benefits. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

To recover under subdivision (1) the area affected and the area taken must constitute a single tract. Unity of ownership is an important criterion. State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

III. PLEADING AND PROOF.

Admissibility of Evidence Generally. —

When the Department of Transportation takes only a part of a tract of land, the owners may introduce at the jury trial on the issue of compensation any evidence of damage to the remaining property caused by the Department of Transportation before the opening of the jury trial. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

ARTICLE 11.

Outdoor Advertising Control Act.

§ 136-134.1. Judicial review.

CASE NOTES

Court Not Bound by Secretary's Findings and Conclusions. — While an interpretation of a statute or rule of an agency administering it is to be accorded some deference, the superior court's review of a decision by the Secretary of Transportation is de novo. Therefore, the superior court is thus not bound by the Secretary's findings of fact and conclusions of law and may arrive at a different conclusion of law based upon the same evidence. Appalachian Poster Adv. Co. v. Bradshaw, 65 N.C. App. 117, 308 S.E.2d 764 (1983).

Chapter 138.

Salaries, Fees and Allowances.

Sec.
138-4. (Effective until July 1, 1985) Governor to set salaries of administrative officers; exceptions.
138-4. (Effective July 1, 1985) Governor to set salaries of administrative officers; exceptions.
138-5. Per diem and allowances of State boards, etc.

§ 138-4. (Effective until July 1, 1985) Governor to set salaries of administrative officers; exceptions.

The salaries of all State administrative officers not subject to the State Personnel Act shall be payable in equal monthly installments, and if no provision is otherwise made by law, shall be set by the Governor subject to consultation with the Advisory Budget Commission.

Whenever by law it is provided that a salary shall be fixed or set by the General Assembly in the Budget Appropriation Act, and that office or position is filled by appointment of the Governor, or the appointment is subject to the approval of the Governor, or is made by a commission a majority of whose members are appointed by the Governor, then the Governor may, after consultation with the Advisory Budget Commission, increase or decrease the salary of a new appointee by a maximum of ten percent (10%) over or under the salary of that position as provided in the Budget Appropriation Act, such increased or decreased salary to remain in effect until changed by the General Assembly or until the end of the fiscal year, whichever occurs first. The Governor under this paragraph may not increase the salary of any nonelected official above the level set in the Current Operations Appropriations Act for any member of the Council of State. This section does not apply to any office filled by election by the people, and does not apply to any office in the legislative or judicial branches. (1947, c. 898; 1957, c. 541, s. 1; 1983, c. 717, s. 49; 1983 (Reg. Sess., 1984), c. 1034, s. 216.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 138-4.

Editor's Note. —

Section Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted the next-to-last sentence.

§ 138-4. (Effective July 1, 1985) Governor to set salaries of administrative officers; exceptions.

The salaries of all State administrative officers not subject to the State Personnel Act shall be payable in equal monthly installments, and if no provision is otherwise made by law, shall be set by the Governor subject to consultation with the Advisory Budget Commission.

Whenever by law it is provided that a salary shall be fixed or set by the General Assembly in the Current Operations Appropriations Act, and that office or position is filled by appointment of the Governor, or the appointment is subject to the approval of the Governor, or is made by a commission a majority of whose members are appointed by the Governor, then the Governor may, after consultation with the Advisory Budget Commission, increase or decrease the salary of a new appointee by a maximum of ten percent (10%) over

§ 138-4 is set out twice. See section heading for effective dates.

or under the salary of that position as provided in the Current Operations Appropriations Act, such increased or decreased salary to remain in effect until changed by the General Assembly or until the end of the fiscal year, whichever occurs first. The Governor under this paragraph may not increase the salary of any nonelected official above the level set in the Current Operations Appropriations Act for any member of the Council of State. This section does not apply to any office filled by election by the people, and does not apply to any office in the legislative or judicial branches. (1947, c. 898; 1957, c. 541, s. 1; 1983, c. 717, s. 49; 1983 (Reg. Sess., 1984), c. 1034, ss. 164, 216.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 138-4.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 216, effective July 1, 1984, inserted the next-to-last sentence.

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 164, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriation Act in this section.

§ 138-5. Per diem and allowances of State boards, etc.

(f) Members of all State boards, commissions and councils whose salaries or any portion of whose salaries are paid from State funds shall receive no per diem compensation from State funds for their services; provided, however, that members of State boards, commissions and councils who are also members of the General Assembly shall receive, when the General Assembly is not in session, subsistence and travel allowances at the rate set forth in G.S. 120-3.1(a)(2) through (a)(4). (1961, c. 833, s. 5; 1963, c. 1049, s. 1; 1965, c. 169; 1971, c. 1139; 1973, c. 1397; 1979, c. 838, s. 18; 1979, 2nd Sess., c. 1137, s. 29; 1983, c. 761, s. 24; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 185.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "G.S. 120-3.1(a)(2) through (a)(4)" for "G.S. 120-3.1(4)."

§ 138-6. Travel allowances of State officers and employees.

Cross References. —

For provision that notwithstanding this section, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides, see § 7A-171.1(b).

§ 138-4 is set out twice. See section heading for effective dates.

Chapter 139.

Soil and Water Conservation Districts.

Article 1.

General Provisions.

§ 139-2. Legislative determinations, and declaration of policy.

CASE NOTES

Applied in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Article 4.

Grants for Small Watershed Projects.

§ 139-54. Purposes for which grants may be requested.

Editor's Note. — Session Laws 1983, c. 757, s. 14, provides: "Of the one million one hundred thousand dollars ($1,100,000) appropriated for fiscal year 1983-84 in Section 3.1 of this act for a reserve for Water Resources Projects, up to one-third may be used for small watershed projects. Notwithstanding the provisions of G.S. 139-54, no funds appropriated herein shall be used for State participation in the costs of land rights acquisition for small watershed projects."

Chapter 143.

State Departments, Institutions, and Commissions.

Article 1.

Executive Budget Act.

Sec.

143-2. Purposes.
143-3.3. Assignments of claims against State.
143-4. Advisory Budget Commission.
143-4.1. Biennial inspection.
143-12. Bills containing proposed appropriations.
143-12.1. Vending facilities.
143-13. Printing copies of budget report and bills and rules for the introduction of the same.
143-15. Reduction and increase of items by General Assembly.
143-18. Unencumbered balances to revert to treasury; capital appropriations excepted.
143-27.2. Discontinued service retirement allowance and severance wages for certain State employees.
143-31.1. Study and review of plans and specifications for building, improvement, etc., projects.
143-34.1. Payrolls submitted to the Director of the Budget; approval of payment of vouchers; payment of required employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security; support of hospital and medical insurance programs for retired members of certain associations, organizations, boards, etc.
143-34.4. [Recodified.]
143-34.7. Participation by legislative officers.
143-34.8, 143-34.9. [Reserved.]

Article 2D.

North Carolina Board for Need-Based Student Loans.

143-47.21. Creation of Board.
143-47.24. Powers and duties.

Article 7.

Inmates of State Institutions to Pay Costs.

143-127.1. Parental liability for payment of cost of care for long-term patients in Department of Human Resources facilities.

Article 12.

Law-Enforcement Officers' Retirement System.

Sec.

143-166. Law-Enforcement Officers' Retirement System.
143-166.02. Death Benefit Plan.
143-166.03. Special annuity accounts.

Article 12B.

Salary Continuation Plan for Certain State Law-Enforcement Officers.

143-166.21 to 143-166.29. [Reserved.]

Article 12C.

Retirement Benefits for State Law-Enforcement Officers.

143-166.30. Retirement benefits for State law-enforcement officers.
143-166.31 to 143-166.39. [Reserved.]

Article 12D.

Separation Allowances for Law-Enforcement Officers.

143-166.40. Rules for selection and retention of law-enforcement officers; rules exempt from Administrative Procedure Act.
143-166.41. Special separation allowance.

Article 31.

Tort Claims against State Departments and Agencies.

143-300.1. Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.

Article 36.

Department of Administration.

143-341. Powers and duties of Department.

Article 61.

Commission on the Bicentennial of the United States Constitution.

143-563. Statement of purpose.
143-564. Creation of Commission; membership; quorum.

Sec.
143-565. Officers and staff; compensation.
143-566. Transfer of property; offices; power to contract.
143-567. Commission may accept gifts.
143-568. Logo.
143-569. Duties of the Commission.
143-570. Termination of Commission.

Article 1.

Executive Budget Act.

§ 143-1. Scope and definitions.

Editor's Note. —
Session Laws 1983 (Reg. Sess., 1984), c. 971, s. 5, and c. 1034, s. 252, both provide that the provisions of this Article, the Executive Budget Act, are reenacted and shall remain in full force and effect and are incorporated in the act by reference.

§ 143-2. Purposes.

It is the purpose of this Article to vest in the Governor of the State a direct and effective supervision of all agencies, institutions, departments, bureaus, boards, commissions, and every State agency by whatsoever name now or hereafter called, including the same power and supervision over such private corporations and persons and organizations of all kinds that may receive, pursuant to statute, any funds either appropriated by, or collected for, the State of North Carolina, or any of its departments, boards, divisions, agencies, institutions and commissions; for the efficient and economical administration of all agencies, institutions, departments, bureaus, boards, commissions, persons or corporations that receive or use State funds; and for the initiation and preparation of a balanced budget of any and all revenues and expenditures for each session of the General Assembly.

The Governor shall be ex officio Director of the Budget. The purpose of this Article is to include within the powers of the Office of State Budget and Management all agencies, institutions, departments, bureaus, boards, and commissions of the State of North Carolina under whatever name now or hereafter known, and the change of the name of such agencies hereafter shall not affect or lessen the powers and duties of the Office of State Budget and Management in respect thereto.

The test as to whether an institution, department, agency, board, commission, or corporation or person is included within the purpose and powers and duties of the Director of the Budget shall be whether such agency or person receives for use, or expends, any of the funds of the State of North Carolina, including funds appropriated by the General Assembly and funds arising from the collection of fees, taxes, donations appropriative, or otherwise.

Notwithstanding the general language in this Article the expenditure of funds by or under the supervision and control of the State Auditor, State Treasurer, and Administrative Officer of the Courts for their respective departments shall not, except as provided in G.S. 7A-113 or in G.S. 143-25, be subject to the powers of the Director of the Budget or the Office of State Budget and Management, it being intended that the State Auditor, State Treasurer, and Administrative Office of the Courts shall be independent of any fiscal control exercised by the Director of the Budget and shall be subject only to such control as may be exercised by the Advisory Budget Commission. (1925, c. 89, s. 2; 1929, c. 100, s. 2; 1955, c. 578, s. 1; c. 743; 1957, c. 269, ss. 1, 2; 1979, 2nd Sess., c. 1137, s. 37; 1981, c. 859, s. 47.1; 1983 (Reg. Sess., 1984), c. 1109, s. 10.)

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted "G.S. 7A-113 or in" near the middle of the last paragraph.

§ 143-3.3. Assignments of claims against State.

(a) All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment of any such claim or any part or share thereof shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest therein: Provided that this section shall not apply to assignments made in favor of hospitals, building and loan associations, prepaid legal services, uniform rental firms to allow employees of the Department of Transportation to rent day-glo orange shirts or vests as required by federal and State law, and medical, hospital, disability and life insurance companies: Provided further, that any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions, who is a member of any credit union organized pursuant to Chapter 54 of the North Carolina General Statutes having a membership at least one half of whom are employed by the State or its institutions, departments, bureaus, agencies or commissions, may authorize, in writing, the periodic deduction from his salary or wages as such employee of a designated lump sum, which shall be paid to such credit unions when said salaries or wages are payable, for deposit to such accounts, purchase of such shares or payment of such obligations as the employee and the credit union may agree: Provided further, that any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions, who is a member of a domiciled State employees' association with a membership of not less than 5,000 members may authorize in writing the periodic deduction from his salary or wages a designated sum to be paid to the employees' association. This plan of payroll deductions for State employees and other association members shall become null and void at such time as the employee association engages in collective bargaining. Nothing in this last proviso shall apply to local boards of education, county or municipal governments or any local governmental units. Provided further, that subject to the rules and regulations adopted by the Director of the Budget, any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions may authorize in writing the withholding from his salary or wages an amount to satisfy his pledge to the State Employees Combined Campaign. Provided further, that subject to any rules and regulations adopted by the Director of the Budget, any employee of a local board of education or community college may authorize in writing the withholding from his salary or wages a periodic deduction of a designated sum to be paid to any organization which qualifies for recognition of exemption by the Internal Revenue Service as a charitable organization as defined in section 501(c)(3) of the Internal Revenue Code which has first been approved by his local board of education or community college board.

(b) Subsection (a) of this section shall not apply to assignments made to meet child support obligations pursuant to G.S. 110-136.1. (1925, c. 249; 1935, c. 19; 1939, c. 61; 1941, c. 128; 1965, c. 1179; 1969, c. 625; 1977, c. 88; 1981, c. 869; 1981 (Reg. Sess., 1982), c. 1282, ss. 14, 15; 1983, c. 680; c. 913, s. 49; 1983 (Reg. Sess., 1984), c. 1034, s. 147; c. 1036, s. 1.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1036, s. 1, purported to amend § 147-62. In view of the recodification of § 147-62 as this section by Session Laws 1983, c. 913, s. 49, the changes directed by the amendment have been made to this section.

Session Laws 1983 (Reg. Sess., 1984), c. 1036, s. 2, provides: "Nothing herein contained shall be construed to obligate the General Assembly to make additional appropriations to implement the provisions of this act."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1034, effective January 1, 1985, deleted a proviso which read "Provided, further, that this section shall not apply to assignments made by members of the State Highway Patrol, agents of the State Bureau of Investigation, motor vehicle inspectors of the Revenue Department, and State prison guards, to the commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund in payment of dues due by such persons to such fund:" preceding the last proviso in the first sentence of subsection (a).

The 1983 (Reg. Sess., 1984) amendment by c. 1036, effective June 29, 1984, designated the first paragraph as subsection (a) and added subsection (b).

CASE NOTES

Policy behind this "anti-assignment" statute does not require that an unpaid indemnitee be precluded from bringing its claim. Ledbetter Bros. v. North Carolina Dep't of Transp., — N.C. App. —, 314 S.E.2d 761 (1984).

§ 143-4. Advisory Budget Commission.

The Chairman of the Appropriations and the Finance Committees of the House and of the Senate, three other Senators appointed by the President of the Senate, three other Representatives appointed by the Speaker of the House, and five other persons appointed by the Governor shall constitute the Advisory Budget Commission. If the Governor appoints any members of the General Assembly to the Advisory Budget Commission, he must appoint an equal number from the Senate and House of Representatives.

The Chairman of the Advisory Budget Commission shall also receive an additional two thousand five hundred dollars ($2,500) payable in quarterly installments, for expenses.

The members of the Advisory Budget Commission shall receive no per diem compensation for their services, but shall receive the same subsistence and travel allowance as are provided for members of the General Assembly for services on interim legislative committees. The Governor shall call a meeting of the Commission during the period beginning with the convening of each regular session and ending 30 days later. Otherwise, meetings of the Commission may be called by the Governor or by the chairman.

Members of the Commission shall take the oath of office at or before the first meeting of the Commission they attend.

The Office of State Budget and Management, under the direction of the State Budget Officer, shall serve as staff to the Commission. The State Budget Officer shall designate a secretary to the Commission.

After the agenda for a meeting has been delivered to the members of the Commission, no other item shall be considered at that meeting except upon the approval of a majority of the members present and voting.

Except for the Governor, persons who are not members of the Commission may address the Commission only at the invitation of the Governor, the chairman, or a majority of the members present and voting.

A vacancy in a seat on the Commission filled by the chairman of a finance or an appropriations committee shall be filled by appointment by the officer who appointed the chairman causing the vacancy. A vacancy in one of the other seats on the Commission shall be filled by appointment by the officer who appointed the person causing the vacancy.

The Advisory Budget Commission alone shall be responsible for recommending to the General Assembly proposed biennial budgets for the requirements of the State Auditor, State Treasurer, and Administrative Offi-

cer of the Courts and for such purposes the Advisory Budget Commission shall require the State Auditor, State Treasurer, and Administrative Officer of the Courts to maintain records and to submit budget requests and periodic reports on their respective departments in the same manner and form as do other State agencies, and may further direct that such requests and reports be filed for safekeeping in the office of the Office of State Budget and Management.

Before the end of each fiscal year or as soon thereafter as practicable, the Advisory Budget Commission shall contract with a competent certified public accountant who is in no way otherwise affiliated with the State or with any agency thereof to conduct a thorough and complete audit of the receipts and expenditures of the State Auditor's office during the immediate fiscal year just ended, and to report to the Advisory Budget Commission on such audit not later than the following October first. A sufficient number of copies of such audit shall be provided so that at least one copy is filed with the Governor's Office, one copy with the Office of State Budget and Management and at least two copies filed with the Secretary of State.

In all matters where action on the part of the Advisory Budget Commission is required by this Article, 10 members of the Commission shall constitute a quorum for performing the duties or acts required by the Commission. (1925, c. 89, s. 4; 1929, c. 100, s. 4; 1931, c. 295; 1951, c. 768; 1955, c. 578, s. 3; 1957, c. 269, s. 2; 1973, c. 820, ss. 1-3; 1979, 2nd Sess., c. 1137, ss. 25, 29.1, 37; 1981, c. 859, s. 47.1; 1983, c. 48, ss. 1-3; 1983 (Reg. Sess., 1984), c. 1034, s. 148.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted the present second and third sentences of the third paragraph for a former second sentence, which read "The Advisory Budget Commission shall be called in conference in January and July of each year, upon 10 days' notice by the Director of the Budget, and at such other times as in the opinion of the Director may be for the public interest," and inserted the present fourth through seventh paragraphs.

§ 143-4.1. Biennial inspection.

The Commission shall make a biennial inspection of those physical facilities of the State it deems necessary. (1983 (Reg. Sess., 1984), c. 1034, s. 149.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 143-11. Survey of departments.

CASE NOTES

Cited in Stam v. Hunt, — N.C. App. —, 310 S.E.2d 623 (1984).

§ 143-12. Bills containing proposed appropriations.

The Director, by and with the advice of the Commission, shall cause to be prepared and submitted to the General Assembly the following bills:

(1) A bill containing all proposed current operations appropriations of the budget for each year in the ensuing biennium, which shall be known

as the "Current Operations Appropriations Bill", and a bill containing all proposed capital appropriations of the budget for each year in the ensuing biennium, which shall be known as the "Capital Improvement Appropriations Bill".

(2) If necessary, a bill containing the Director of the Budget's views on revenue for the ensuing biennium, which shall be known as the "Budget Revenue Bill, and shall provide an amount of revenue for the ensuing biennium sufficient, in the opinion of the Director and the Commission, to meet the appropriations contained in the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill.

(3) Repealed by Session Law 1983 (Regular Session, 1984), c. 1034, s. 153.

To the end that all expenses of the State may be brought and kept within the budget, the Current Operations Appropriations Bill shall contain a specific sum as a contingent or emergency appropriation. The manner of the allocation of such contingent or emergency appropriation shall be as follows: Any institution, department, commission, or other agency or activity of the State, or other activity in which the State is interested, desiring an allotment out of such contingent or emergency appropriation, shall upon forms prescribed and furnished by the Director of the Budget, present such request in writing to the Director of the Budget, with such information as he may require, and if the Director of the Budget shall approve such request, in whole or in part, he shall forthwith present the same to the Governor and Council of State, and upon their order only shall such allotment be made. If the Director shall disapprove the request of such an allotment out of the emergency or contingent appropriation, he shall transmit his refusal and his reason therefor to the Governor and Council of State for their information.

If the Director and the Commission shall not agree as to the Appropriations and Revenue Bills in substantial particulars, the Director shall prepare the same, based on his conclusions and judgment, and shall cause to be submitted therewith such statements of disagreement, and the particulars thereof, as the Commission, or any of its members, shall find proper to submit as representing their own views. (1925, c. 89, s. 13; 1929, c. 100, ss. 12, 13, 14; 1957, c. 269, s. 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 150, 151, 153, 154.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote subdivisions (1) and (2), deleted subdivision (3), relating to the Budget Machinery Bill, substituted "Current Operations Appropriations Bill" for "Budget Appropriations Bill" near the middle of the first sentence of the second unnumbered paragraph, and substituted "Appropriations and Revenue Bills" for "Appropriation, Revenue and Machinery Bills" near the beginning of the last paragraph.

§ 143-12.1. Vending facilities.

(a) The receipts from vending facilities operated by State agencies, institutions, departments, boards, and commissions are State funds. The payments received by a State agency, institution, department, board or commission by contract under which another party operates vending facilities and pays a sum to the State, whether computed as a percentage of gross or net receipts or gross or net profits, or as a fixed or variable fee, are State funds.

(b) The receipts or payments described in subsection (a) of this section from vending facilities shall be deposited as provided by law in the appropriate fund to be determined by the Office of State Budget and Management.

(c) The net proceeds from vending facilities are subject to appropriation by the General Assembly.

(d) The Office of State Budget and Management shall submit to the General Assembly along with or as a part of the biennial budget (and along with or as a part of any second-year budget requests) budgets for vending facilities operated by General Fund, Highway Fund, and Wildlife Fund departments' and institutions' operating budgets.

(e) Budgets for vending facilities prepared under subsection (d) of this section shall reflect total receipts from the facilities, and the total costs to staff, stock, and operate the vending facilities, shall set out the total net proceeds, and shall contain, in line-item detail, requests the departments and institutions have submitted to expend the net proceeds. If a State agency or institution receives payments on account of vending facilities but does not actually operate the facilities, the budget shall contain a statement of the payments and shall contain, in line-item detail, requests the departments and institutions have submitted to expend the net proceeds.

(f) The net proceeds that the General Assembly approves for expenditure by the department or institution shall be retained in the appropriate fund budget code for the purposes approved by the General Assembly.

(g) For the purposes of this section "vending facilities" has the same meaning as provided in G.S. 111-42(d), but also means any mechanical or electronic device dispensing items or something of value or entertainment or services for a fee, regardless of the method of activation, and regardless of the means of payment, whether by coin, currency, tokens, or other means.

(h) The provisions of subsections (c) through (f) of this section shall not supersede or apply to operations under the provisions of Article 3 of Chapter 111 of the General Statutes, G.S. 127A-138(b), or G.S. 116-36.1 through G.S. 116-36.3, or to the operation of any vending facility by a community college, technical institute, technical college, or local school administrative unit, but they shall apply to the operations of North Carolina Memorial Hospital. (1983 (Reg. Sess., 1984), c. 1034, s. 166.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 175, makes this section effective Oct. 1, 1984, except that subsection (c) through (f) shall become effective beginning with the 1985-87 biennial State Budget.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 143-13. Printing copies of budget report and bills and rules for the introduction of the same.

The Director shall cause to be printed one thousand copies each of the budget report, the Current Operations Appropriations Bill, Capital Improvement Appropriations Bill, and the Budget Revenue Bill. The Governor shall present copies thereof to the General Assembly, together with the biennial message, except incoming Governors may, at the first session of the General Assembly in their respective terms, submit the same after the biennial message has been presented to the General Assembly. The Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill shall be introduced by the chairman of the committee on appropriations in each house of the General Assembly, and the Budget Revenue Bill shall be introduced by the chairmen of the finance committees in each branch of the General Assembly: Provided, that for the years in which the Governor is elected, other than when a Governor is elected for a second successive term the Director shall deliver the budget report and the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill and the Budget Revenue Bill to the Governor-elect, on or before the fifteenth day of December, and the said budget

report, Appropriations, and Revenue Bills, shall be presented by the Governor to the General Assembly with such recommendations in the way of amendments, or other modifications, together with such criticism as he may determine. The provisions herein contained as to the introduction of the bills mentioned in this section shall be considered and treated as a rule of procedure in the Senate and House of Representatives until otherwise expressly provided for by a rule in either, or both, of said branches of the General Assembly. (1925, c. 89, s. 14; 1929, c. 100, s. 15; 1983 (Reg. Sess., 1984), c. 1034, ss. 152, 155-158.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted references to the Current Operations Appropriations Bill and Capital Improvement Appropriations Bill for references to the Budget Appropriation Bill throughout the section, deleted references to the Budget Machinery Bill throughout the section, and substituted "the years in which the Governor is elected, other than when a Governor is elected for a second successive term" for "the years in which the Governor is elected" in the proviso at the end of the third sentence.

§ 143-15. Reduction and increase of items by General Assembly.

The provisions of this Article shall continue to be the legislative policy with reference to the making of appropriations and shall be treated as rules of both branches of the General Assembly until and unless the same may be changed by the General Assembly either by express enactment or by rules adopted by either branch of the General Assembly.

The General Assembly may reduce or strike out such item in the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill as it may deem to be the interest of the public service, but neither House shall consider further or special appropriations until the Current Operations Appropriations Bill shall have been enacted in whole or part or rejected, unless the Governor shall submit and recommend an emergency appropriation bill or emergency appropriation bills, which may be amended in the manner set out herein, and such emergency appropriation bill, or bills, when enacted, shall continue in force only until the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill shall become effective, unless otherwise provided by the General Assembly. Provided that the Capital Improvement Appropriations Bill may be considered before the Current Operations Appropriations Bill has been adopted in whole or part or rejected.

The General Assembly may also increase any appropriation set out in the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill and may provide additional appropriations for other purposes if additional revenue or revenues, equal to the amount of such additional appropriations and increases, are provided for by corresponding amendment to the Budget Revenue Bill. No bill carrying an appropriation shall thereafter be enacted by the General Assembly, unless it be for an object or objects therein described and shall provide an adequate source of revenue for defraying such appropriation, or unless it appears from the budget report or the Budget Revenue Bill that there is sufficient revenue available therefor. The appropriation, or appropriations, in such bills shall be in accordance with the classification used in the budget. (1925, c. 89, s. 16; 1929, c. 100, s. 17; 1983 (Reg. Sess., 1984), c. 1034, ss. 159-161.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "until the Current Operations

Appropriations Bill shall have been enacted in whole or part or rejected" for "until the Budget Appropriations Bill shall have been enacted in whole or in part or rejected" near the middle of the first sentence of the second paragraph, added the second sentence of the second paragraph, substituted reference to the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill for reference to the Budget Appropriations Bill throughout the section, and substituted "an object or objects" for "a single object" in the first sentence of the last paragraph.

§ 143-18. Unencumbered balances to revert to treasury; capital appropriations excepted.

All unencumbered balances of maintenance appropriations shall revert to the State treasury to the credit of the general fund or special funds from which the appropriation and/or appropriations, were made and/or expended, at the end of the biennial fiscal period; except that capital expenditures for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made; except that maintenance appropriations to the General Assembly shall remain available until expended, unless provided otherwise by the Legislative Services Commission. (1925, c. 18, s. 19; 1929, c. 100, s. 20; 1983 (Reg. Sess., 1984), c. 1034, s. 181.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 140, provides:

"Notwithstanding the provisions of G.S. 143-18, funds received by any State agency within the scope of the Executive Budget Act pursuant to the Federal Emergency Veterans Job Training Act of 1983 shall not revert to the General Fund at the end of the biennial fiscal period."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 180, provides:

"(a) Notwithstanding G.S. 143-18, funds appropriated to the General Assembly by Chapters 859, 1127, and 1282 of the 1981 Session Laws shall not revert to the General Fund but shall remain available to the General Assembly until expended or until reverted under G.S. 120-32(10).

"(b) The funds covered by this section may be encumbered for such purpose as may be approved by the Director of the Budget.

"(c) This section is effective June 30, 1983."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 30, 1984, added the language beginning "except that maintenance appropriations" at the end of the section.

§ 143-27.2. Discontinued service retirement allowance and severance wages for certain State employees.

The Director of the Budget, upon written request of a State department and with the recommendation of the State Personnel Officer, is authorized to pay either a discontinued service allowance or severance wages to a State employee when the Director determines that the closing of a State institution or a reduction in force will accomplish economies in the State Budget. Severance wages shall not be paid to an employee who chooses a discontinued service retirement. Severance wages shall not be subject to employer or employee retirement contributions.

Notwithstanding any other provisions of the State's retirement laws, any employee of the State who is a member of the Teachers' and State Employees' Retirement System or the Law-Enforcement Officers' Retirement System and who has his job involuntarily terminated as a result of economies in the State Budget may be entitled to a discontinued service retirement allowance, subject to the approval of the employing agency and the availability of agency funds. An unreduced discontinued service retirement allowance, not otherwise allowed, may be approved for employees with 25 or more years of creditable

retirement service who are at least 55 years of age; or a discontinued service retirement allowance, not otherwise allowed, may be approved for employees with 20 or more years of creditable retirement service who are at least 50 years of age, reduced by one-fourth of one percent (¼ of 1%) for each month that retirement precedes his fifty-fifth birthday. In cases where a discontinued service retirement allowance is approved, the employing agency shall make a lump sum payment to the Administrator of the State Retirement Systems equal to the actuarial present value of the additional liabilities imposed upon the System, to be determined by the System's consulting actuary, as a result of the discontinued service retirement, plus an administrative fee to be determined by the Administrator. (1979, c. 838, s. 22; 1983, c. 761, s. 225; c. 923, s. 217(R); 1983 (Reg. Sess., 1984), c. 1034, s. 251.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 251, provides:

"Subsection (R) of Section 217 of Chapter 923 of the 1983 Session Laws is repealed, and G.S. 143-27.2, as rewritten by Section 225 of Chapter 761 of the 1983 Session Laws, is revived. The intent of this section is to provide discontinued service retirement allowances or severance wages to eligible employees and former State employees who have been terminated prior to June 1, 1984, but who have not yet received their severance wages or discontinued service retirement allowances, or who may have been terminated on or after June 1, 1984, but prior to the enactment of this section, as well as to all eligible employees who were terminated on or after the effective date of this section."

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 143-31.1. Study and review of plans and specifications for building, improvement, etc., projects.

It shall be the duty and responsibility of the Director of the Budget to determine whether buildings, repairs, alterations, additions or improvements to physical properties for which appropriations of State funds are made have been designed for the specific purpose for which such appropriations are made, that such projects have been designed giving proper consideration to economy in first cost, in maintenance cost, in materials and type of construction. Architectural features shall be selected which give proper consideration to economy in design. The Director of the Budget shall have prepared a complete study and review of all plans and specifications for such projects and bids on same will not be received until the results of such study and review have been incorporated in such plans and specifications, and until economic conditions of the construction industry are considered by the Office of State Budget and Management to be favorable to the letting of construction contracts. The Director of the Budget may, when he considers it in the best interest of the State to do so, terminate design contracts when it is documented that the designer has failed to perform the conditions enumerated in the contract.

Notwithstanding G.S. 143-135, the Director of the Budget may authorize the Department of Human Resources and the Department of Correction to use funds necessary for projects that correct deficiencies, improve living conditions, or renovate unneeded patient space for State office space. (1953, c. 1090; 1963, c. 423; 1975, c. 879, s. 46; 1979, 2nd Sess., c. 1137, s. 37; 1981, c. 860, s. 12; 1983 (Reg. Sess., 1984), c. 1116, s. 95.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the second paragraph.

§ 143-34.1. Payrolls submitted to the Director of the Budget; approval of payment of vouchers; payment of required employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security; support of hospital and medical insurance programs for retired members of certain associations, organizations, boards, etc.

All payrolls of all departments, institutions, and agencies of the State government shall, prior to the issuance of vouchers in payment therefor, be submitted to the Director of the Budget, who shall check the same against the appropriations to such departments, institutions and agencies for such purposes, and if found to be within said appropriations, he shall approve the same and return one to the department, institution or agency submitting same and transmit one copy to the State Disbursing Officer, and no voucher in payment of said payroll or any item thereon shall be honored or paid except and to the extent that the same has been approved by the Director of the Budget.

Required employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for employees whose salaries are paid from general fund or highway fund revenues, or from department, office, institutional or agency receipts, or from nonstate funds, shall be paid from the same source as the source of the employees' salaries. In those instances in which an employee's salary is paid in part from the general fund, or the highway fund, and in part from the department, office, institutional or agency receipts, or from nonstate funds, the required salary-related contributions shall be paid from the general fund, or the highway fund, only to the extent of the proportionate part paid from the general fund, or highway fund, in support of the salary of such employee, and the remainder of the employer's contribution requirements shall be paid from the same source which supplies the remainder of such employee's salary. The requirements of this section as to the source of payment are also applicable to payments on behalf of the employee for hospital-medical insurance, longevity payments, salary increments, and legislative salary increases. The Director of the Budget shall approve the method of payment by State departments, offices, institutions and agencies for employer salary-related requirements of this section, and determine the applicability of the section to an employer's salary-related contribution or payment in behalf of an employee. (1949, c. 718, s. 5; 1957, c. 269, s. 2; 1961, c. 1181, s. 4; 1979, 2nd Sess., c. 1137, s. 44; 1983 (Reg. Sess., 1984), c. 1034, s. 162.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted the former last paragraph of this section, which read "For the support of the hospital and medical insurance programs made available by G.S. 135-33 to those retired members of the associations and organizations listed in G.S. 135-27(a), the licensing and examining boards under G.S. 135-1.1, the North Carolina Art Society, Inc., and the North Carolina Symphony Society, Inc., each association or organization shall pay to the Retirement System the full cost of providing these benefits as determined by the Board of Trustees of the Retirement System."

§ 143-34.4: Recodified as § 120-36.6 by Session Laws 1983 (Regular Session 1984), c. 1034, s. 177.1, effective July 1, 1984.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 143-34.7. Participation by Legislative Officers.

The Speaker and Speaker Pro Tempore of the House of Representatives and the President Pro Tempore and Majority Leader of the Senate may attend all meetings of the Advisory Budget Commission. (1983 (Reg. Sess., 1984), c. 1034, s. 163.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§§ 143-34.8, 143-34.9: Reserved for future codification purposes.

Article 2D.

North Carolina Board for Need-Based Student Loans.

§ 143-47.21. Creation of Board.

The North Carolina Board for Need-Based Student Loans, hereinafter referred to as the Board, is established in the Office of State Budget and Management to provide financial assistance on the basis of demonstrated need as determined by the Board to students who are residents of North Carolina and who are accepted in an accredited degree-granting program or in an accredited program granting a diploma or an approved certificate, in any school, college or university, leading to graduation as physicians, dentists, optometrists, pharmacists, nurses, nurse instructors, nurse anesthetists, medical technicians, social workers, psychologists or other health professionals, or leading to graduation as mathematicians or scientists as so determined by the Board. (1981 (Reg. Sess., 1982), c. 1388, s. 4; 1983, c. 761, ss. 176, 177; 1983 (Reg. Sess., 1984), c. 1116, s. 104.)

Editor's Note. —
Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted "or in an accredited program granting a diploma or an approved certificate".

§ 143-47.24. Powers and duties.

The Board shall administer a program of student loans and scholarships to those students designated in G.S. 143-47.21 that it determines have demonstrated financial need and who otherwise qualify. The loans administered pursuant to this Article shall be repaid in manners determined by the Board, including discharge by service.

The Board shall promulgate rules and regulations for the administering of the program.

The Board shall prepare a written annual report giving an account of its proceedings, transactions and any recommendations it may have and shall submit this report to the Governor and the General Assembly.

All staff, clerical and other services required by the Board shall be supplied by the Office of the State Budget and Management. The position of Executive Secretary to the Board shall be appointed by the State Budget Officer and is exempt from G.S. 126-5(a). The compensation of the Secretary shall be fixed by the State Budget Officer after consultation with the Office of State Personnel. (1981 (Reg. Sess., 1982), c. 1388, s. 4; 1983, c. 761, ss. 180, 181; 1983 (Reg. Sess., 1984), c. 1034, s. 139.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted the present second sentence of the first paragraph for the former second and third sentences thereof, which read "The loans administered pursuant to this Article shall be repaid in a manner to be determined by the Board. There shall be no forgiveness of any portion of the loans."

Article 7.

Inmates of State Institutions to Pay Costs.

§ 143-127.1. Parental liability for payment of cost of care for long-term patients in Department of Human Resources facilities.

(d) Notwithstanding any other provisions of the law, for the purposes of determining eligibility for medical assistance under Title XIX of the Social Security Act, the income and financial resources of the natural or adoptive parents of a person who is under the age of 19 and who is a patient in a medical institution shall not be counted if the patient's physician certifies that the care and treatment is expected to exceed 12 months. (1971, c. 218, s. 1; 1973, c. 476, s. 133; c. 775; 1975, c. 19, s. 48; 1979, c. 838, ss. 25-27; 1983, c. 12; 1983 (Reg. Sess., 1984), c. 1116, s. 82.)

Only Part of Section Set Out. —As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 82(b), provides that the amendment to subsection (d) of this section by s. 82(a) of this act shall expire June 30, 1986.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote subsection (d). For the expiration date of this amendment, see the Editor's note above.

Article 8.

Public Building Contracts.

§ 143-128. Separate specifications for building contracts; responsible contractors.

Local Modification. — (As to Article 8) City of Lumberton: 1983 (Reg. Sess., 1984), c. 996.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1062, s. 3, provides:

"The Council of State is hereby authorized to adopt a bond order providing for the issuance, pursuant to the North Carolina Parking Facilities and Project Revenue Bond Act, Chapter 858, Session Laws of 1975 as amended, of not in excess of ten million dollars ($10,000,000) aggregate principal amount of revenue bonds of the State for the purpose of constructing a parking deck behind the Administration Building. The Capital Building Authority is authorized to award the design and construction contract for such facility on a design/build basis, notwithstanding G.S Chapter 143, Article 8 and Section 12 of Chapter 858, Session Laws of 1975."

§ 143-135. Limitation of application of Article.

Local Modification. — Duplin County: 1983 (Reg. Sess., 1984), c. 959; City of Lumberton: 1983 (Reg. Sess., 1984), c. 950.

Article 9B.

North Carolina Code Officials Qualification Board.

§ 143-151.8. Definitions.

Editor's Note. —
Session Laws 1977, c. 531, s. 7, which is noted in an Editor's note under this section in the Replacement Volume, was repealed by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 124.

Article 12.

Law-Enforcement Officers' Retirement System.

§ 143-166. Law-Enforcement Officers' Retirement System.

(a) A retirement system is established and placed under the administration of a board of trustees for the purpose of providing retirement allowances under the provisions of this section for eligible law-enforcement officers employed by local governments of the State, as an employees' trust in conformance with section 401(a) of the Internal Revenue Code of 1954 as amended. It shall be known as the "Law-Enforcement Officers' Retirement System" and by such name all of its business transacted, its fund invested, and its cash and other property held.

To provide the employer funding of benefits under this section and the death benefits under the employee welfare plan provided in G.S. 143-166.02, there shall be paid (i) contributions of one and one-half dollars ($1.50) for each cost of court assessed under G.S. 7A-304 and (ii) contributions by the employers of law-enforcement officers to the extent expressly required in annual and biennial appropriation acts or any other acts of the North Carolina General Assembly.

(a1) The board of trustees shall set a uniform annual percentage rate of contribution payable by each county, city, town or other political subdivision of the State (hereinafter referred to as an employer) necessary to fund the benefits and allowances provided under this section for law-enforcement officers employed by each employer who are members of this Retirement System. The employer shall pay monthly into the Retirement System an amount equal to the annual percentage rate of contribution multiplied by the total monthly compensation of members employed by the employer; Provided, the employer

rate of contribution required of an employer shall be reduced in an amount equivalent to any appropriations for such purpose as are made from time to time by the North Carolina General Assembly. The Board of Trustees shall adopt such rules and regulations as are necessary and reasonable for the collection of employer contributions.

(b) For the purpose of determining the recipients of benefits under this Article and the amounts thereof to be disbursed and for formulating and making such rules and regulations as may be essential for the equitable and impartial distribution of such benefits to and among the persons entitled to such benefits, there is hereby created a board to be known as "The Board of Trustees of the Law-Enforcement Officers' Retirement System." The membership of the Board of Trustees shall consist of eight members, as follows:

(1) The State Treasurer, who shall be chairman ex officio;

(2) Repealed by Session Laws 1983, c. 913, s. 37, effective July 22, 1983.

(3) The State Insurance Commissioner, who shall be a member ex officio;

(4) Four members to be appointed by the Governor and to serve at his will, one of whom shall be a sheriff, one a police officer, one a retired law-enforcement officer in receipt of an allowance from the Retirement System, and one representing the public at large;

(5) Two members to be appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Neither member appointed by the General Assembly may be an active or retired law-enforcement officer. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(i1) (Contingent on Filing by July 30, 1985, of a Favorable Letter of Determination or Ruling from the I.R.S.) Pick Up of Officer Contributions. — Anything within this section to the contrary notwithstanding and pursuant to the provisions of section 414(h)(2) of the Internal Revenue Code of 1954 as amended a county, city, town or other political subdivision of the State (hereinafter referred to as an "employer") may elect to enter into an agreement with the Board of Trustees to pick up and pay the contributions which would be payable by officers employed by employers as members under subsection (i) of this section with respect to the service of their officers after the effective date of this subsection and after the effective date of such agreements; Provided, this provision to pick up and pay the officers' contributions by employers shall apply only to such employers who are participating employers in the Local Governmental Employees' Retirement System or who administer some employers' trust qualified under sections 401(a), 403(a) or 405(a) of the Internal Revenue Code of 1954 as amended, and then only if such employers have elected to pick up and pay employee contributions for all their other employees to the other qualified employees' trust.

The officers' contributions picked up by an employer shall be designated for all purposes of the Retirement System as member contributions, except for the determination of tax upon a distribution from the System. These contributions shall be credited to the Regular Contributions Account and accumulated within the account in a member's account which shall be separately established for the purpose of accounting for picked-up contributions.

Members' contributions picked up by an employer shall be payable from the same source of funds used for the payment of compensation of a member. A deduction shall be made from a member's compensation equal to the amount of his contributions picked up by an employer. This deduction, however, shall

not reduce his compensation. Picked-up contributions shall be transmitted to the System monthly for the preceding month by means of a warrant drawn by the State or other employer and payable to the Law-Enforcement Officers' Retirement System and shall be accompanied by a schedule of the picked-up contributions on such forms as may be prescribed.

(m) "Law-enforcement officers" in the meaning of this Article shall mean all officers employed by a political subdivision of the State, who are clothed with the full power of arrest and whose primary duty is that of enforcing on public property the criminal laws of the State and/or serving civil processes. The term "law-enforcement officers," for purposes of participating in this fund and for receiving benefits under this section, includes otherwise qualified persons who are members of the fund and who are participating in an intergovernmental exchange of personnel under Article 10 of Chapter 126 provided the requirements of Article 10 of Chapter 126 are met; provided further, that a member participating in an intergovernmental exchange of personnel under Article 10 of Chapter 126 shall be entitled to any death benefits to which he would otherwise be entitled regardless of whether he and his employers are making contributions to the member's account during the exchange period except that no duplicate benefits shall be paid.

(o), (p) Repealed by Session Laws 1983 (Regular Session 1984), c. 1034, s. 245, effective January 1, 1985.

(x8) From and after July 1, 1984, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1983, shall be increased by eight percent (8.0%) of the allowance payable on July 1, 1983.

(1937, c. 349, s. 9; 1939, c. 6, ss. 2, 3; c. 233; 1941, cc. 56, 157; 1943, c. 145; 1949, c. 1055; 1951, c. 382; 1953, c. 883; 1957, c. 839; c. 846, s. 2½; 1961, c. 397; 1963, cc. 144, 939, 953; 1965, c. 351, ss. 1, 2; 1967, c. 691, s. 52; c. 943; 1971, c. 80, ss. 1, 2; c. 837, s. 6; c. 1235; 1973, c. 931; 1977, c. 783, s. 4; c. 1090; 1977, 2nd Sess., c. 1204, s. 3; 1979, c. 467, s. 19; c. 838, ss. 97, 100-102, 105; c. 976, ss. 1, 2; 1979, 2nd Sess., c. 1137, ss. 65, 68, 72; c. 1214; c. 1215, ss. 1, 2; c. 1225, ss. 1-5; 1981, c. 672, s. 3; c. 859, ss. 43, 45; c. 940, s. 3; c. 975, s. 1; c. 978, s. 5; c. 980, s. 6; 1981 (Reg. Sess., 1982), c. 1191, s. 48; 1983, c. 468, ss. 1-7, 10; c. 533, s. 3; c. 761, ss. 220, 232, 241; c. 913, ss. 37, 38; 1983 (Reg. Sess., 1984), c. 1034, ss. 223, 239-245.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1034, s. 223, effective July 1, 1984, added subsection (x8).

The 1983 (Reg. Sess., 1984) amendment by c. 1034, ss. 239-245, effective January 1, 1985, inserted "employed by the local governments of the State" in the first paragraph of subsection (a); substituted "one and one-half dollars ($1.50)" for "two dollars ($2.00)" in the second paragraph of subsection (a); in subsection (a1) substituted "payable by each county, city, town or other political subdivision of the State" for "payable by the State and each county, city, town or political subdivision thereof" in the first sentence and deleted "other than the State" following "Provided, the employer rate of contribution required of an employer" in the second sentence; in subsection (b) substituted "eight members" for "10 members" near the end of the second sentence of the introductory paragraph, substituted "Four members" for "Five members" at the beginning of subdivision (4), and deleted "one a law enforcement officer employed by the State" preceding "one a retired law-enforcement officer" near the end of subdivision (4); in the first paragraph of subsection (i1) deleted former subdivision (1), relating to the pick-up of contributions by the State, deleted the designation "(2)" at the beginning of former subdivision (2), substituted "(hereinafter referred to as an 'employer')" for "(hereinafter referred to as 'other employer')," and substituted reference to "employers" for reference to "other employers" throughout the paragraph; in the second and third paragraphs of subsection (i1) substituted "picked up by an employer" for "picked up by the State or other employer"; in subsection (m) substituted "employed by a political subdivision of the

State" for "employed by the State of North Carolina or any political subdivision thereof"; and deleted subsections (o) and (p), relating to State employees.

§ 143-166.02. Death Benefit Plan.

There is created a Group Life Insurance Plan (hereinafter called the "Plan") which is established as an employee welfare benefit plan that is separate and apart from the Retirement System, and under which the members of the Retirement System, shall participate and be eligible for group life insurance benefits. Upon receipt of proof, satisfactory to the Board of Trustees in their capacity as trustees under the Group Life Insurance Plan, of the death in service of a member who had completed at least one full calendar year of membership in the Retirement System, there shall be paid to such person as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit. Such death benefit shall be equal to the greater of:

(1) The compensation on which contributions were made by the member during the calendar year preceding the year in which his death occurs; or

(2) The greatest compensation on which contributions were made by the member during a 12-month period of service within the 24-month period of service ending on the last day of the month preceding the month in which his last day of actual service occurs;

(3) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1049, s. 2.

subject to a maximum of twenty thousand dollars ($20,000), less any death benefit paid from the Separate Benefit Fund. Such death benefit shall be payable apart and separate from the payment of the member's accumulated contributions under the system on his death. For the purpose of the Plan, a member shall be deemed to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service.

The Board of Trustees shall provide the death benefit either (i) by purchasing a contract or contracts of group life insurance with any life insurance company or companies licensed and authorized to transact business in this State for the purpose of insuring the lives of members in service, or (ii) by establishing a separate trust fund qualified under section 501(c)(9) of the Internal Revenue Code of 1954, as amended, for such purpose. If a separate trust fund is established, it shall be operated in accordance with rules and regulations adopted by the Board of Trustees and all investment earnings on the trust fund shall be credited to such fund.

(4) In administration of the death benefit contained in this subsection, the following shall apply:

a. For the purpose of determining eligibility only, in this subsection "calendar year" shall mean any period of 12 consecutive months or, if less, the period covered by an annual contract of employment. For all other purposes in this subsection "calendar year" shall mean the 12 months beginning January 1 and ending December 31.

b. Last day of actual service shall be:

1. When employment has been terminated, the last day the member actually worked;

2. When employment has not been terminated, the date on which an absent member's sick and annual leave expired.

c. A member on leave of absence from his position as a law-enforcement officer for the purpose of serving as a member or officer of the General Assembly shall be deemed to be in service

during sessions of the General Assembly and thereby covered by the provisions of the death benefit. The amount of the death benefit for such member shall be the equivalent of the salary to which the member would have been entitled as a law-enforcement officer during the 12-month period immediately prior to the month in which death occurred, not to exceed twenty thousand dollars ($20,000), less any death benefit paid from the Separate Benefit Fund.

(5) The provisions of the Retirement System pertaining to administration, G.S. 143-166(a) through (f), and management of funds, G.S. 143-166(g), are hereby made applicable to the Plan.

(6) Accidental Death Benefit. — In addition to all other death benefits provided by this section, there shall be paid an amount from the Plan not to exceed two thousand one hundred dollars ($2,100) in total on account of the death of any law enforcement officer, without regard to membership in the Retirement System, caused by an accident while in the actual performance of duty. In order for this benefit to be paid, the death of the officer must have occurred within one year of the accident and a claim made by the beneficiaries made within one year of the accident and a claim made by the beneficiaries made within one year of the death of the officer. The beneficiaries and amounts payable hereunder are:

a. The sum of one thousand dollars ($1,000) as partial reimbursement for burial expenses payable to the surviving spouse, parent or legal representatives of the officer;

b. The sum of five hundred dollars ($500.00) to the surviving spouse of the officer or, if there is no surviving spouse, the legal representatives of the officer; and

c. The sum of two hundred dollars ($200.00) to each child of the officer who is under the age of 18 years or who is disabled. (1983, c. 468, ss. 1, 2, 7; 1983 (Reg. Sess., 1984), c. 1049, ss. 1-3.)

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1049, s. 4, provides: "No inchoate or pending right of any beneficiary in receipt of a disability retirement allowance from the Teachers' and State Employees', Local Governmental Employees', or Law Enforcement Officers' Retirement Systems, on the date of ratification of this act shall be diminished." The act was ratified July 2, 1984.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1984, rewrote subdivision (2), deleted subdivision (3), relating to any member who had applied for and was entitled to receive a disability retirement allowance under the system, and rewrote the last sentence of the first paragraph.

§ 143-166.03. Special annuity accounts.

(a) Election. — Any county, city, town or other political subdivision of the State (hereinafter referred to as an employer), and any member, may elect to pay special contributions to be credited to designated individual accounts of members of the Retirement System, in addition to any contributions as otherwise required by this Article, to provide annuities to members payable at retirement and throughout life which are in addition to the basic service and disability retirement allowances under G.S. 143-166(y). Such election by an employer shall be effective only after a written agreement is entered into between an employer and the Board of Trustees of the Retirement System, under conditions as are hereinafter required. The special contributions paid by employers are hereby declared expended as a public purpose.

(e) Repealed by Session Laws 1983 (Regular Session 1984), c. 1034, s. 247, effective January 1, 1985.

(1983, c. 468, s. 8; 1983 (Reg. Sess., 1984), c. 1034, ss. 246, 247.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, substituted "Any county, city, town or other political subdivision of the State" for "The State and any county, city, town or political subdivision thereof" at the beginning of subsection (a), deleted "other than the State" following "Such election by an employer" at the beginning of the second sentence of subsection (a), and deleted subsection (e), relating to State contributions for State-employed members.

Article 12B.

Salary Continuation Plan for Certain State Law-Enforcement Officers.

§§ 143-166.21 to 143-166.29: Reserved for future codification purposes.

Article 12C.

Retirement Benefits for State Law-Enforcement Officers.

§ 143-166.30. Retirement benefits for State law-enforcement officers.

(a) Definitions. — The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Beneficiary" means any person in receipt of a retirement allowance or other benefit from a Retirement System.

(2) "Creditable service" means membership service plus prior service plus military service allowable with a Retirement System.

(3) "Employer" means the State of North Carolina and its departments, agencies and institutions.

(4) "Law-enforcement officer" means a full-time paid employee of an employer who is actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State or serving civil processes, and who possesses the power of arrest by virtue of an oath administered under the authority of the State.

(5) "Member" means an officer included in the membership of a retirement system including former officers no longer employed who also elected to leave their accumulated contributions on deposit with a Retirement System.

(6) "Officer" means a "law-enforcement officer".

(7) "Participant" means an officer with an individual account with the Supplemental Retirement Income Plan.

(8) "Regular accumulated contributions" means the sum of all contributions of a member made to the Retirement System, together with regular interest thereon, pursuant to G.S. 143-166 as the same appeared prior to January 1, 1985.

(9) "Retirement allowance" means annual payments for life payable in monthly installments continuing until the death of a beneficiary.

(10) "Law-Enforcement Officers' Retirement System" means the system provided for under G.S. 143-166.

(11) "Special annuity account accumulated contributions" means the sum of all contributions of a member or an employer made to the Special Annuity Accounts for Members of the Law-Enforcement Officers' Retirement System, together with regular interest thereon, pursuant to G.S. 143-166.03 as the same appeared prior to January 1, 1985.

(12) "Special Annuity Accounts" means the supplemental defined contribution provisions of the Law-Enforcement Officers' Retirement System, provided for under G.S. 143-166.03 as the same appeared prior to January 1, 1985.

(13) "State" means the State of North Carolina.

(14) "State Retirement System" means the Teachers' and State Employees' Retirement System of North Carolina provided for under Article 1 of Chapter 135 of the General Statutes.

(15) "Supplemental Retirement Income Plan" means a plan created in conformance with Section 401(a), 401(k), or any other section of the Internal Revenue Code of 1954 as amended.

(b) Basic Retirement System. — On and after January 1, 1985, law-enforcement officers employed by the State shall be members of the Teachers' and State Employees' Retirement System and beneficiaries who were last employed as officers by the State, or who are surviving beneficiaries of officers last employed by the State, shall be beneficiaries of the State Retirement System and paid in benefit amounts then in effect. All members of the Law-Enforcement Officers' Retirement System last employed and paid by the State shall be members of the State Retirement System.

(c) Transfers of Assets and Liabilities to Other Retirement Systems. — As of January 1, 1985, certain assets and liabilities of the Law-Enforcement Officers' Retirement System shall be transferred to the Teachers' and State Employees' Retirement System and the Supplemental Retirement Income Plan in the amounts calculated and in the order of precedence enumerated as follows:

(1) The regular accumulated contributions of members of the Law-Enforcement Officers' Retirement System employed by the State or last employed by the State shall be transferred from the annuity savings fund of the Law-Enforcement Officers' Retirement System to the annuity savings fund of the State Retirement System to the credit of each individual officer.

(2) An amount equal to the present value of the liabilities on account of the retirement allowances payable to beneficiaries last employed as officers by the State and the surviving beneficiaries of officers last employed by the State, as calculated by the Retirement System's consulting actuary, shall be transferred from the pension accumulation fund of the Law-Enforcement Officers' Retirement System to the pension accumulation fund of the State Retirement System.

(3) After the transfers provided for above, additional assets in the pension accumulation fund of the Law-Enforcement Officers' Retirement System shall be transferred to the pension accumulation fund of the State Retirement System, in an amount equal to the ratio of the accrued liabilities on account of members of the Law-Enforcement Officers' Retirement System employed by the State or last employed by the State to the total accrued liabilities on account of all members of the Law-Enforcement Officers' Retirement System.

(4) The special annuity account accumulated contributions shall be transferred from the special annuity savings fund of the Law-Enforcement Officers' Retirement System to the Supplemental Retirement Income Plan pursuant to subsection (d) of this section to the credit of individual officers.

(d) Supplemental Retirement Income Plan for State Law-Enforcement Officers. — As of January 1, 1985, there shall be created a Supplemental Retirement Income Plan, hereinafter called the "Plan", established for the benefit of all law-enforcement officers employed by the State, who shall be participants. The Board of Trustees of the State Retirement System shall administer the Plan and shall, under the terms and conditions otherwise appearing herein, provide Plan benefits either (i) by establishing a separate trust fund in conformance with Section 401(a), Section 401(k) or other sections of the Internal Revenue Code of 1954 as amended or, (ii) by causing the Plan to affiliate with some master trust fund providing the same benefits for participants. The Plan shall be separate and apart from any retirement systems.

In addition to the contributions transferred from the Law-Enforcement Officers' Retirement System and the contributions otherwise provided for in this Article, participants may make voluntary contributions to the Plan to be credited to the designated individual accounts of participants; provided, in no instance shall the total contributions by a participant exceed ten percent (10%) of a participant's compensation within any calendar year.

All contributions to the Plan shall be credited to the individual accounts of participants, and shall be fully and immediately vested in the name of the participant, and shall be invested according to each participant's election, as provided by the Board of Trustees, including but not limited to time deposits, and both fixed and variable investments. The Plan may provide for loans to participants, at reasonable rates of interest to be charged, from participants' individual accounts, and may provide for withdrawal of contributions on account of hardship.

The benefit to a participant in the Plan shall be either a lump-sum distribution or a distribution in periodic installments of the participant's account payable under retirement, disability, or termination of employment. Upon the death of a participant there shall be paid the same lump-sum distribution or periodic installments to the surviving spouse of the participant or otherwise to the participant's estate; provided, should a participant instruct the Board of Trustees in writing that he does not wish these benefits to be paid to his spouse or estate, then the benefits shall be paid to the person or persons as the participant may name for this purpose.

(e) State Contributions to the Supplemental Retirement Income Plan. — Under all other restrictions as are herein provided, the State shall contribute monthly to the individual accounts of participants who are employed by the State an amount equal to five percent (5%) of the compensation of each participant. The contributions so paid shall be in addition to the contributions on account of court cost assessments as hereinafter provided.

Contributions shall be made to the individual accounts of all participants in the Plan on a per capita basis in equal shares, equal to the sum of the one-half dollar ($0.50) for each cost of court assessed and collected under G.S. 7A-304.

The provisions of the State Retirement System pertaining to administration and management of funds under G.S. 135-6 and 7 are made applicable to the Plan.

(g) Exemption from Taxes, Garnishment and Attachment. — The right of a participant in the Supplemental Retirement Income Plan to the benefits provided under this Article is nonforfeitable and exempt from levy, sale, garnishment, and the benefits payable under this Article are hereby exempt from any State and local government taxes.

(h) Notwithstanding any other provisions of law, any pending or inchoate rights of a member of the Law-Enforcement Officers' Retirement System as of their transfer to the State Retirement System on January 1, 1985, including the rights to a vested deferred retirement allowance and to commence retirement at certain ages with required years of service as a law-enforcement officer, shall in no way be diminished; provided, however, in no event may a member commence retirement and continue membership service with the same Retirement System. (1983 (Reg. Sess., 1984), c. 1034, s. 248.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 248, makes this Article effective January 1, 1985.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§§ 143-166.31 to 143-166.39: Reserved for future codification purposes.

Article 12D.

Separation Allowances for Law-Enforcement Officers.

§ 143-166.40. Rules for selection and retention of law-enforcement officers; rules exempt from Administrative Procedure Act.

(a) Except as otherwise provided by State and federal law, the head of each principal State department may establish rules and procedures for the selection and retention of sworn law-enforcement officers to ensure that they are physically, emotionally, and intellectually qualified to perform their duties. These rules and procedures shall not establish any mandatory age limit for service as a law-enforcement officer that conflicts with a federal statute.

(b) These rules and procedures are exempt from the provisions of Chapter 150A of the General Statutes. (1983 (Reg. Sess., 1984), c. 1034, s. 104.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this Article effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 143-166.41. Special separation allowance.

(a) Notwithstanding any other provision of law, every sworn law-enforcement officer employed by a State department, agency, or institution who qualifies under this section shall receive, beginning on the last day of the month in which he retires on a basic service retirement under the provisions of G.S. 135-5(a) or G.S. 143-166(y), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him for each year of creditable service. The allowance shall be paid in 12 equal installments on the last day of each month. To qualify for the allowance the officer shall:

(1) Have (i) completed 30 or more years of creditable service or, (ii) have attained 55 years of age and completed five or more years of creditable service; and

(2) Not have attained 62 years of age.

(b) As used in this section, "creditable service" means the service for which credit is allowed under the retirement system of which the officer is a member.

(c) Payment to a retired officer under the provisions of this section shall cease at the death of the individual or on the last day of the month in which he attains 62 years of age.

(d) This section does not affect the benefits to which an individual may be entitled from State, federal, or private retirement systems.

(e) The head of each State department, agency, or institution shall determine the eligibility of employees for the benefits provided herein.

(f) The Director of the Budget may authorize from time to time the transfer of funds within the budgets of each State department, agency, or institution necessary to carry out the purposes of this Article. These funds shall be taken from those appropriated to the department, agency, or institution for salaries and related fringe benefits.

(g) The head of each State department, agency, or institution shall make the payments set forth in subsection (a) to those persons certified under subsection (e) from funds available under subsection (f). (1983 (Reg. Sess., 1984), c. 1034, s. 104.)

ARTICLE 31.

Tort Claims against State Departments and Agencies.

§ 143-291. Industrial Commission constituted a court to hear and determine claims; damages.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 31, provides: "The Department of Public Education shall expend funds appropriated to it to satisfy judgments and settlements under the Tort Claims Act only for that purpose."

CASE NOTES

As to liability of a college or university for a criminal attack by a third person upon its students, see Brown v. North Carolina Wesleyan College, Inc., 65 N.C. App. 579, 309 S.E.2d 701 (1983).

Post-judgment interest not authorized. — Absent a specific statutory provision authorizing the accrual of interest on damage awards under this section, the State Tort Claims Act, no post-judgment interest can accrue to a tort claims award thereunder. Myers v. Department of Crime Control & Pub. Safety, No. 83101C455 (N.C. App., April 3, 1984).

Claimant awarded $60,000 in his action against the Department of Crime Control and Public Safety under this section, the State Tort Claims Act, was not entitled to post-judgment interest on the award pending appeal. Myers v. Department of Crime Control & Pub. Safety, No. 83101C455 (N.C. App., April 3, 1984).

§ 143-300.1. Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.

(c) In the event that the Industrial Commission shall make award of damages against any county or city board of education pursuant to this section, the Attorney General shall draw a voucher for the amount required to pay such award. The funds necessary to cover vouchers written by the Attorney General for claims against county and city boards of education for accidents involving

school buses and school transportation service vehicles shall be made available from funds appropriated to the Department of Public Instruction. Neither the county or city boards of education, or the county or city administrative unit shall be liable for the payment of any award made pursuant to the provisions of this section in excess of the amount paid upon such voucher by the Attorney General. Settlement and payment may be made by the Attorney General as provided in G.S. 143-295.

(1955, c. 1283; 1961, c. 1102, ss. 1-3; 1967, c. 1032, s. 1; 1975, c. 589, s. 1; c. 916, ss. 1, 2; 1977, c. 935, s. 1; 1979, 2nd Sess., c. 1332, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 30.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted the present second sentence of subsection (c).

Article 33C.

Meetings of Public Bodies.

§ 143-318.9. Public policy.

CASE NOTES

Public body which underwent little more than a change of name through incorporation continued to be an agency of the county. To hold otherwise would eviscerate the public policy of this section. Winfas, Inc. v. Region P Human Dev. Agency, 64 N.C. App. 724, 308 S.E.2d 99 (1983).

§ 143-318.10. All official meetings of public bodies open to the public.

CASE NOTES

Applied in Winfas, Inc. v. Region P Human Dev. Agency, 64 N.C. App. 724, 308 S.E.2d 99 (1983).

§ 143-318.12. Public notice of official meetings.

CASE NOTES

Stated in Wright v. County of Macon, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

Article 36.

Department of Administration.

§ 143-341. Powers and duties of Department.

The Department of Administration has the following powers and duties:

(8) General Services:

a. To locate, maintain and care for public buildings and grounds; to establish, locate, maintain, and care for walks, driveways, trees, shrubs, flowers, fountains, monuments, memorials, markers, and tablets on public grounds; and to beautify the public grounds.

b. To provide necessary and adequate cleaning and janitorial service, elevator operation service, and other operation or maintenance services for the public buildings and grounds.

c. To provide necessary night watchmen for the public buildings and grounds.

d. To make prompt repair of all public buildings and the equipment, furniture, and fixtures thereof; and to establish and operate shops for that purpose.

e. To keep in repair, out of funds appropriated for that purpose, the furniture of the halls of the Senate and House of Representatives and the rooms of the Capitol used by the officers, clerks, and other employees of the General Assembly.

f. Struck out by Session Laws 1959, c. 68, s. 3.

g. To establish and operate a central mailing system for all State agencies, and in connection therewith and in the discretion of the Secretary, to make application for and procure a post-office substation for that purpose, and to do all things necessary in connection with the maintenance of the central mailing system. The Secretary may allocate and charge against the respective departments and agencies their proportionate parts of the cost of the maintenance of the central mailing system.

h. To provide necessary and adequate messenger service for the State agencies served by the Department. However, this may not be construed as preventing the employment and control of messengers by any State agency when those messengers are compensated out of the funds of the employing agency.

i. To establish and operate a central motor pool and such subsidiary related facilities as the Secretary may deem necessary, and to that end:

1. To establish and operate central facilities for the maintenance, repair, and storage of state-owned passenger motor vehicles for the use of State agencies; to utilize any available State facilities for that purpose; and to establish such subsidiary facilities as the Secretary may deem necessary.

2. To acquire passenger motor vehicles by transfer from other State agencies and by purchase. All motor vehicles transferred to or purchased by the Department shall become part of a central motor pool.

3. To require on a schedule determined by the Department all State agencies to transfer ownership, custody or control of any or all passenger motor vehicles within the ownership, custody or control of that agency to the Department, except those motor vehicles under the ownership, custody or control of the Highway Patrol or the State Bureau of Investigation which are used primarily for law-enforcement purposes.

4. To maintain, store, repair, dispose of, and replace state-owned motor vehicles under the control of the Department.
5. Upon proper requisition and proper showing of need for use upon State business only, to assign suitable transportation, either on a temporary or permanent basis, to any State agency.
6. To allocate and charge against each State agency to which transportation is furnished, on a basis of mileage or of rental, its proportionate part of the cost of maintenance and operation of the motor pool.
7. To adopt, with the approval of the Governor, reasonable rules and regulations for the efficient and economical operation, maintenance, repair, and replacement of all state-owned motor vehicles under the control of the Department, and to enforce those rules and regulations; and to adopt, with the approval of the Governor, reasonable rules and regulations regulating the use of private motor vehicles upon State business by the officers and employees of State agencies, and to enforce those rules and regulations. The Department, with the approval of the Governor, may delegate to the respective heads of the agencies to which motor vehicles are permanently assigned by the Department the duty of enforcing the rules and regulations adopted by the Department pursuant to this paragraph. Any person who violates a rule or regulation adopted by the Department and approved by the Governor is guilty of a misdemeanor, and upon conviction is punishable in the discretion of the court.

7a. To adopt with the approval of the Governor and the advice of the Advisory Budget Commission and to enforce rules, pursuant to Chapter 150A of the General Statutes, and to coordinate State policy regarding (i) the permanent assignment of state-owned passenger motor vehicles and (ii) the use of and reimbursement for those vehicles for commuting. For the purpose of this subdivision 7a, "state-owned passenger motor vehicle" includes any state-owned passenger motor vehicle, whether or not owned, maintained or controlled by the Department of Administration, and regardless of the source of the funds used to purchase it. Notwithstanding the provisions of G.S. 20-190 or any other provisions of law, all state-owned passenger motor vehicles are subject to the provisions of this subdivision 7a; no permanent assignment shall be made and no one shall be exempt from payment of reimbursement for commuting or from the other provisions of this subdivision 7a except as provided by this subdivision 7a.

A State-owned passenger motor vehicle shall not be permanently assigned to an individual who is likely to drive it on official business at a rate of less than 12,600 miles per year unless (i) the individual's duties are routinely related to public safety or (ii) the individual's duties are likely to expose him routinely to life-threatening situations. A State-owned passenger motor vehicle shall also not be permanently assigned to an agency that is likely to drive it on official business at a rate of less than 12,600 miles per year unless the agency can justify to the Division of Motor Fleet Management the need for permanent assignment because of the unique use of the vehicle. The Department of Administra-

tion shall verify, on a quarterly basis, that each motor vehicle has been driven at the minimum allowable rate. If it has not and if the department by whom the individual to which the car is assigned is employed or the agency to which the car is assigned cannot justify the lower mileage for the quarter in view of the minimum annual rate, the permanent assignment shall be revoked immediately.

Every individual who uses a State-owned passenger motor vehicle, pick-up truck, or van to drive between his official work station and his home, shall reimburse the State for these trips at the current motor pool rate established by the Department of Administration. If the round trip is 13 miles or less, reimbursement shall be for 13 miles times 20 work days per month; if the round trip is more than 13 miles, reimbursement shall be for the actual round trip mileage times 20 work days per month. Reimbursement shall be made by payroll deduction. Funds derived from reimbursements on vehicles owned by the Motor Fleet Management Division shall be deposited to the credit of the Division; funds derived from reimbursements on vehicles initially purchased with appropriations from the Highway Fund and not owned by the Division shall be deposited in a Special Depository Account in the Department of Transportation which shall revert to the Highway Fund; funds derived from reimbursement on all other vehicles shall be deposited in a Special Depository Account in the Department of Administration which shall revert to the general fund. This paragraph shall not apply to law-enforcement officers in the following agencies whose primary duties are not administrative: (i) State Bureau of Investigation, (ii) Alcohol law-enforcement agents of the Department of Crime Control and Public Safety, and (iii) the Butner Public Safety Department, probation and parole officers or to members of the Council of State. This paragraph also shall not apply to members of the Highway Patrol in Troops A through H or to other members of the Highway Patrol whose primary duties are not administrative as determined by the Highway Patrol Commander. This paragraph also shall not apply to up to 350 employees of the Division of Highways of the Department of Transportation who are subject to 24-hour emergency call in the performance of their official duties or to up to 400 employees of the Division of Highways, during the construction season, who are required to work abnormal hours and on weekends on highway construction contract work, in the discretion of the Secretary of the Department of Transportation. The Department of Administration, Motor Fleet Management Division shall report to the Joint Legislative Commission of Governmental Operations every 90 days on exemptions from the commuting fees granted under the provisions of this paragraph.

The Department of Administration shall revoke the assignment or require the Department owning the vehicle to revoke the assignment of a state-owned passenger motor vehicle, pick-up truck or van to any individual who:

I. Uses the vehicle for other than official business except in accordance with the commuting rules;

II. Fails to supply required reports to the Department of Administration, or supplies incomplete reports, or supplies reports in a form unacceptable to the Department of Administration and does not cure the deficiency within 30 days of receiving a request to do so;

III. Knowingly and willfully supplies false information to the Department of Administration on applications for permanent assignments, commuting reimbursement forms, or other required reports or forms;

IV. Does not personally sign all reports on forms submitted for vehicles permanently assigned to him and does not cure the deficiency within 30 days of receiving a request to do so;

V. Abuses the vehicle; or

VI. Violates other rule or policy promulgated by the Department of Administration not in conflict with this act.

A new requisition shall not be honored until the Secretary of the Department of Administration is assured that the violation for which a vehicle was previously revoked will not recur.

The Department of Administration, with the approval of the Governor and the advice of the Advisory Budget Commission, may delegate, or conditionally delegate, to the respective heads of agencies which own passenger motor vehicles or to which passenger motor vehicles are permanently assigned by the Department, the duty of enforcing all or part of the rules adopted by the Department of Administration pursuant to this subdivision 7a. The Department of Administration, with the approval of the Governor and the advice of the Advisory Budget Commission, may revoke this delegation of authority.

8. To adopt and administer rules and regulations for the control of all state-owned passenger motor vehicles and to require State agencies to keep all records and make all reports regarding motor vehicle use as the Secretary deems necessary.

9. To acquire motor vehicle liability insurance on all state-owned motor vehicles under the control of the Department.

10. To contract with the appropriate State prison authorities for the furnishing, upon such conditions as may be agreed upon from time to time between such State prison authorities and the Secretary, of prison labor for use in connection with the operation of a central motor pool and related activities.

11. To report annually to the General Assembly on any rules adopted, amended or repealed under paragraphs 3, 7, or 7a of this subdivision.

j. To establish and operate a central telephone system, central mimeographing and duplicating services, central stenographical and clerical pools, and other central services, if the Governor after appropriate investigation deems it advisable from the standpoint of efficiency and economy in operation to establish any or all such services. The Secretary may allocate and charge against the respective agencies their proportionate part of the cost of maintenance and operation of the central services which are established, in accordance with the rules and regulations adopted by him and approved by the Governor and Council of State pursuant to para-

graph k, below. Upon the establishment of central mimeographing and duplicating services, the Secretary may, with the approval of the Governor, require any State agency to be served by those central services to transfer to the Department ownership, custody, and control of any or all mimeographing and duplicating equipment and supplies within the ownership, custody, or control of such agency.

k. To require the State agencies and their officers and employees to utilize the central facilities and services which are established; and to adopt, with the approval of the Governor and Council of State, reasonable rules, regulations, and procedures requiring the utilization of such central facilities and services, and governing their operation and the charges to be made for their services.

l. To provide necessary information service for visitors to the Capitol.

m. To perform such additional duties and exercise such additional powers as may be assigned to it by statute or by the Governor.

(1957, c. 215, s. 2; c. 269, s. 1; 1959, c. 683, ss. 2-4; c. 1326; 1963, c. 1, s. 5; 1965, c. 1023; 1969, c. 1144, s. 2; 1971, c. 1097, s. 3; 1975, c. 399, ss. 1, 2; c. 879, s. 46; 1979, c. 136, s. 1; c. 544; 1979, 2nd Sess., c. 1137, s. 38; 1981, c. 300; c. 859, ss. 48-51; 1981 (Reg. Sess., 1982), c. 1282, s. 62; 1983, c. 267, s. 1; c. 717, s. 74; c. 761, ss. 58, 151, 173, 174; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 122.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — For provision that State officers and employees who perform computerized data processing functions pursuant to subdivision (9) of this section for the Department of Revenue are authorized to receive and process for the Department information in reports and returns and are subject to certain criminal provisions, see § 105-259.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote the second paragraph of subparagraph (8) i 7a.

Article 61.

Commission on the Bicentennial of the United States Constitution.

§ 143-563. Statement of purpose.

It is the purpose of this Article to establish a Commission to promote and coordinate activities to commemorate the bicentennial of the Constitution. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

Cross References. — For the termination date of the Commission, see § 143-570.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 48, makes this Article effective December 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115 is a severability clause.

§ 143-564. Creation of Commission; membership; quorum.

(a) There is established the North Carolina Commission on the Bicentennial of the United States Constitution, hereinafter referred to as the "Commission".

(b) The Commission shall be composed of 21 members as follows:
(1) The Chief Justice of the Supreme Court, or his designee;
(2) The President Pro Tempore of the Senate, or his designee;
(3) The Speaker of the House of Representatives, or his designee;
(4) Six persons appointed by the Chief Justice;
(5) Six persons appointed by the President Pro Tempore; and
(6) Six persons appointed by the Speaker.

Each of the individuals making appointments shall seek to achieve a balanced membership representing, to the maximum extent practicable, the State as a whole. The Commission members shall be chosen from among individuals who have demonstrated scholarship, a strong sense of public service, expertise in the learned professions, and abilities likely to contribute to the fulfillment of the duties of the Commission. Members of the Commission shall be appointed for the life of the Commission.

The Chief Justice, President Pro Tempore and Speaker shall serve as cochairmen, and they shall annually designate one of themselves to preside. Eleven members of the Commission shall constitute a quorum, but a lesser number may conduct meetings. A vacancy in the Commission resulting from the death or resignation of a member shall be filled in the same manner in which the original appointment was made. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

§ 143-565. Officers and staff; compensation.

(a) The cochairmen shall appoint a staff director who shall be paid a salary to be set by the cochairmen. The Director with the approval of the cochairmen may appoint and fix the compensation of such additional publicly paid personnel up to five persons.

(b) Subject to the provisions of this subsection, the Director with the approval of the cochairmen may appoint and fix the compensation of additional personnel to be paid out of private donations. An individual appointed to a position funded in such manner shall be so designated at the time of such individual's appointment.

(c) Each member of the Commission shall serve without being compensated as a member of the Commission, except that each member who is not a State officer or employee shall be reimbursed for travel, and subsistence, as is provided for State employees generally. State officers and employees shall be reimbursed as provided in G.S. 138-6, and members of the General Assembly shall be reimbursed as provided in G.S. 120-3.1(a)(4).

(d) No personnel other than the staff director may be appointed prior to the convening of the 1985 General Assembly.

(e) Whenever this Article requires something to be done by the cochairmen or to be approved by the cochairmen, it must be done or approved by a majority of them.

(f) Any expenditures of funds by the Commission, regardless of the source, must be approved by the cochairmen. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

§ 143-566. Transfer of property; offices; power to contract.

(a) Upon request of the Commission, the head of any State agency may assign any property, equipment, and personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Article. Assignments under this subsection shall be without reimbursement by the Commission to the agency from which the assignment was made.

(b) The Office of State Property, North Carolina Department of Administration, shall provide office space in Raleigh for use as Commission offices, and the

Department of Administration shall receive no reimbursement from the Commission for the use of such property during the life of the Commission.

(c) The Commission is authorized to procure supplies, services, and property, and make contracts, in any fiscal year, only to such extent or in such amounts as are provided in appropriation acts or are donated pursuant to G.S. 143-567. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

§ 143-567. Commission may accept gifts.

The Commission is authorized to accept, use, solicit, and dispose of donations of money, property, or personal services. The Commission shall prescribe regulations under which the Commission may accept donations of money, property, or personal services. The regulations prescribed under this subsection shall include procedures for determining the value of donations of property or personal services. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

§ 143-568. Logo.

The Commission shall have the authority to design and use a logo as the official emblem of the bicentennial. The Commission shall issue rules and regulations, regarding the use of such logo, except that under those regulations, the Commission shall be prohibited from selling, leasing, or otherwise granting to any corporation or private person the right to use the logo in connection with the production or manufacture of any commercial goods, as part of an advertisement promoting any commercial goods or services, or as part of an endorsement for any such goods or services. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

§ 143-569. Duties of the Commission.

(a) The Commission shall:

(1) Plan and develop activities appropriate to commemorate the bicentennial of the Constitution, including a limited number of projects to be undertaken by the State of North Carolina seeking to harmonize and balance the important goals of ceremony and celebration with the equally important goals of scholarship and education;

(2) Encourage private organizations and local governments to organize and participate in bicentennial activities commemorating or examining the drafting, ratification, and history of the Constitution and the specific features of the document;

(3) Coordinate, generally, activities throughout all of the State; and

(4) Serve as a clearinghouse for the collection and dissemination of information about bicentennial events and plans.

(b) In planning and implementing appropriate activities to commemorate the bicentennial, the Commission shall give due consideration to:

(1) The historical setting in which the Constitution was developed and ratified, including such antecedents as the Federalist Papers, the Articles of the Confederation, and the ratification debates of this State;

(2) The contribution of diverse ethnic and racial groups;

(3) The relationship and historical development of the three branches of the Government;

(4) The importance of activities concerning the Constitution and citizenship education throughout the State;

(5) The unique achievements and contributions of the participants in the Constitutional Convention of 1787 and the State ratification proceedings;

(6) The diverse legal and philosophical views regarding the Constitution;
(7) The need for reflection upon both academic and scholarly views of the Constitution and the principle that the document must be understood by the general public;
(8) The substantive provisions of the Constitution itself;
(9) The impact of the Constitution on American life and government;
(10) The need to encourage appropriate educational curriculums designed to educate students at all levels of learning on the drafting, ratification, and history of the Constitution and the specific provisions of that document; and
(11) The significance of the principles and institutions of the Constitution to other nations and their citizens.

(c) The Commission shall seek the cooperation, advice, and assistance from both private and governmental agencies and organizations.

(d) The Commission may, in carrying out the purposes of this Article, be designated as a State Advisory Commission under Section 6(d) of P.L. 98-101.

(e) Within two years after December 1, 1984, the Commission shall submit to each House of the General Assembly and to the Administrative Office of the Courts a comprehensive report incorporating specific recommendations of the Commission for commemoration and coordination of the bicentennial and related activities. The report shall include recommendations for publications, scholarly projects, conferences, programs, films, libraries, exhibits, ceremonies, and other projects, competitions and awards, and a calendar of major activities and events planned to commemorate specific historical dates. Each year after submitting the comprehensive report, the Commission shall submit an annual report to each House of the General Assembly, and the Administrative Office of the Courts until such Commission terminates. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

§ 143-570. Termination of Commission.

The Commission shall terminate on December 31, 1989. (1983 (Reg. Sess., 1984), c. 1116, s. 48.)

Chapter 143A.

State Government Reorganization.

ARTICLE 1.

General Provisions.

§ 143A-1. Short title.

CASE NOTES

Stated in Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

§ 143A-6. Types of transfers.

CASE NOTES

Applied in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

ARTICLE 6.

Department of Justice.

§ 143A-49. Creation.

CASE NOTES

The Governor has the duty to supervise the official conduct of all executive officers. The constitutional independence of the executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

Chapter 143B.

Executive Organization Act of 1973.

Article 2.

Department of Cultural Resources.

Part 12. North Carolina Awards Committee.

Sec.

143B-83. North Carolina Awards Committee — creation, powers and duties.

Part 27. Roanoke Voyages and Elizabeth II Commission.

143B-129. Roanoke Voyages and Elizabeth II Commission — creation.

143B-130. Roanoke Voyages and Elizabeth II Commission — powers and duties.

143B-131. Roanoke Voyages and Elizabeth II Commission — members; terms; vacancies; expenses; officers.

Article 3.

Department of Human Resources.

Part 3. Commission for Health Services.

143B-142. Commission for Health Services — creation, powers and duties.

Part 4. Commission for Mental Health, Mental Retardation and Substance Abuse Services.

143B-147. Commission for Mental Health, Mental Retardation, and Substance Abuse Services — creation, powers and duties.

Part 10. North Carolina Medical Care Commission.

143B-165. North Carolina Medical Care Commission — creation, powers and duties.

Part 27. Governor's Waste Management Board.

143B-216.13. Functions and powers of Board.

Article 6.

Department of Correction.

Part 3. Parole Commission.

143B-267. (Effective July 1, 1985) Parole Commission — members; selection; removal; chairman; compensation; quorum; services.

Article 7.

Department of Natural Resources and Community Development.

Part 1. General Provisions.

Sec.

143B-279. Department of Natural Resources and Community Development — organization.

Part 14. North Carolina Water Safety Council.

143B-314 to 143B-316. [Repealed.]

Part 16. Water Quality Council.

143B-320, 143B-321. [Repealed.]

Part 18. Commercial and Sports Fisheries Advisory Committee.

143B-325 to 143B-327. [Repealed.]

Part 25. Triad Park Commission.

143B-342 to 143B-344.2. [Repealed.]

Article 9.

Department of Administration.

Part 14A. Governor's Advocacy Council for Persons with Disabilities.

143B-403.1. Governor's Advocacy Council for Persons with Disabilities — creation; powers and duties.

Part 15A. North Carolina Advisory Council on the Eastern Band of the Cherokee.

143B-411.1. North Carolina Advisory Council on the Eastern Band of the Cherokee — creation; membership; terms of office.

143B-411.2. North Carolina Advisory Council on the Eastern Band of the Cherokee — purpose or creation; powers and duties.

143B-411.3. North Carolina Advisory Council of the Eastern Band of the Cherokee — meetings; quorum; compensation; chairman.

143B-411.4. North Carolina Advisory Council of the Eastern Band of the Cherokee — clerical and administrative support.

Part 22. North Carolina Agency for Public Telecommunications.

Sec.
143B-426.9. North Carolina Agency for Public Telecommunications — creation; membership; appointments, terms and vacancies; officers; meetings and quorum; compensation.
143B-426.11. (Effective July 1, 1985) Powers of Agency.

Article 10.

Department of Commerce.

Part 11. North Carolina Ports Railway Commission.

143B-469.1. (Effective July 1, 1985) Powers of Commission.

Part 11A. North Carolina Hazardous Waste Treatment Commission.

143B-470. Declaration of findings.
143B-470.1. Declaration of purposes.
Sec.
143B-470.2. Definitions.
143B-470.3. Creation of Commission.
143B-470.4. Powers and duties of the Treatment Commission.
143B-470.5. Issuance of bonds and notes.

Article 11.

Department of Crime Control and Public Safety.

Part 1. General Provisions.

143B-475. Department of Crime Control and Public Safety — functions.
143B-475.1. Deferred prosecution, community service restitution, and volunteer program.

Part 3. Governor's Crime Commission.

143B-480. Adjunct committees of the Governor's Crime Commission — creation; purpose; powers and duties.

Article 1.

General Provisions.

Part 1. In General.

§ 143B-1. Short title.

CASE NOTES

Stated in Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

Article 2.

Department of Cultural Resources.

Part 12. North Carolina Awards Committee.

§ 143B-83. North Carolina Awards Committee — creation, powers and duties.

There is hereby created the North Carolina Awards Committee with the duty to advise the Secretary of Cultural Resources on the formulation and administration of the program governing North Carolina awards and on the selection of a committee in each award area to choose the recipients.

The Committee shall advise the Secretary of the Department upon any matter the Secretary may refer to it. (1973, c. 476, s. 71; 1979, c. 504, s. 2; 1983 (Reg. Sess., 1984), c. 995, s. 22.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 995, s. 22, reenacted this section as it existed before it was repealed by Session Laws 1979, c. 504.

Part 27. Roanoke Voyages and Elizabeth II Commission.

§ 143B-129. Roanoke Voyages and Elizabeth II Commission — creation.

There is created in the Department of Cultural Resources the Roanoke Voyages and Elizabeth II Commission. (1983 (Reg. Sess., 1984), c. 1115, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1115, s. 5 makes this Article effective upon ratification. The act was ratified July 7, 1984.

Section 4 of the act provides: "Any funds appropriated by the 1983 General Assembly for fiscal year 1984-85 to the Department of Cultural Resources for operating expenses of the Roanoke Voyages Corridor Commission shall instead be used for operating expenses of the Roanoke Voyages and Elizabeth II Commission."

§ 143B-130. Roanoke Voyages and Elizabeth II Commission — powers and duties.

The Commission may:

(1) Advise the Secretary of the Department of Cultural Resources on matters pertinent to the operation and maintenance of Ice Plant Island, the Elizabeth II State Historic Site and Visitor Center, and the Elizabeth II as permanent memorials commemorating the Roanoke Voyages, 1584-1587;

(2) Make recommendations to the Secretary of the Department of Cultural Resources for establishing and providing for a proper charge for admission to the ship, and for the maintenance and operation of the ship, the visitor center, and the grounds as a permanent memorial and exhibit;

(3) Solicit and accept gifts, grants, and donations;

(4) Identify, preserve, and protect properties located in Dare County having historical significance to the State of North Carolina, Dare County, and the Town of Manteo, with the approval or assistance of the Department of Cultural Resources;

(5) Cooperate with the Secretary and Department of Cultural Resources, the Secretary and Department of Transportation, the Secretary and Department of Natural Resources and Community Development, and other governmental agencies, officials, and entities, and provide them with assistance and advice;

(6) Adopt and enforce such bylaws, rules, regulations, and guidelines that the Commission deems to be reasonably necessary in order to carry out its powers and duties;

(7) Establish and maintain a "Roanoke Voyages and Elizabeth II Commission Fund" composed of moneys which may come into its hands from gifts, donations, grants, or bequests, which funds will be used by the Commission for purposes of carrying out its duties and purposes herein set forth. The Commission may establish a reserve fund to be maintained and used for contingencies and emergencies. (1983 (Reg. Sess., 1984), c. 1115, s. 2.)

§ 143B-131. Roanoke Voyages and Elizabeth II Commission — members; terms; vacancies; expenses; officers.

The Commission shall consist of 24 voting members: 12 appointed by the Governor, six of whom shall be residents of Dare County; eight voting ex officio members who are the Secretary of the Department of Cultural Resources, the Secretary of the Department of Transportation, the Secretary of the Department of Natural Resources and Community Development, the Chairman of the Dare County Board of Commissioners, the Mayor of the Town of Manteo, the Chairman of the Board of Directors of the Friends of Elizabeth II, the Site Manager of the Elizabeth II State Historic Site, and the Chairman of the Roanoke Island Historical Association; and four members appointed by the Commission from time to time according to the procedure it adopts. Members appointed by the Governor shall serve for four-year terms, except that of the initial appointments, six shall be for two-year terms and six for four-year terms. Ex officio members may designate a person to serve as a member of the Commission in their stead. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, or disability of a member shall be made by the Commission and shall be for the balance of the unexpired term. The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

The Governor shall, after recommendations have been sent to him in writing each year at the time of the annual meeting, designate from among the members of the Commission a chairman, vice-chairman, secretary, and treasurer. (1983 (Reg. Sess., 1984), c. 1115, s. 3.)

Article 3.

Department of Human Resources.

Part 3. Commission for Health Services.

§ 143B-142. Commission for Health Services — creation, powers and duties.

(c) The Commission for Health Services shall adopt rules:

(1) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1022, s. 5.

(2) Establishing standards for approving sewage-treatment devices and holding tanks for marine toilets as provided in G.S. 75A-6(o);

(3) Establishing specifications for sanitary privies for schools where water-carried sewage facilities are unavailable as provided in G.S. 115C-522;

(4) Establishing requirements for the sanitation of local confinement facilities as provided in G.S. 153-53.4; and

(5) Governing environmental impact statements and information required in applications to determine eligibility for water supply systems under the provisions of the Clean Water Bond Act.

(1973, c. 476, s. 123; 1975, c. 19, s. 57; c. 694, s. 6; 1979, c. 41, s. 1; 1981, c. 614, s. 9; 1983, c. 891, s. 15; 1983 (Reg. Sess., 1984), c. 1022, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1022, s. 8, makes the act effective from November 1, 1984, through June 30, 1987.

Section 153-53.4, referred to in subdivision (c)(4) of this section, was repealed by Session Laws 1973, c. 822. As to county law enforcement and confinement facilities, see now § 153A-211 et seq.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective from November 1, 1984 to June 30, 1987, deleted subdivision (c)(1), relating to home health agencies.

Part 4. Commission for Mental Health, Mental Retardation and Substance Abuse Services.

§ 143B-147. Commission for Mental Health, Mental Retardation and Substance Abuse Services — creation, powers and duties.

(a) There is hereby created the Commission for Mental Health, Mental Retardation and Substance Abuse Services of the Department of Human Resources with the power and duty to adopt, amend and repeal rules and regulations to be followed in the conduct of State and local mental health, mental retardation, alcohol and drug abuse programs including education, prevention, intervention, treatment, rehabilitation and other related services. Such rules and regulations shall be designed to promote the amelioration or elimination of the mental health, mental retardation, or alcohol and drug abuse problems of the citizens of this State. The Commission for Mental Health, Mental Retardation and Substance Abuse Services shall have the authority:

(1) To establish standards and promulgate rules and regulations regarding the

a. Admission, treatment and professional care of persons admitted to any institution, center or hospital administered by the Department of Human Resources as provided in Chapter 122 of the General Statutes for the mentally ill, mentally retarded, alcohol or drug abusers, which is now or may hereafter be established;

b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, mental retardation and substance abuse authorities under Article 2F of Chapter 122 of the General Statutes;

c. Hearings and appeals of area mental health, mental retardation and substance abuse authorities as provided for in Article 2F of Chapter 122 of the General Statutes;

d. Requirements of the federal government for grants-in-aid for mental health, mental retardation, alcohol or drug abuse programs which may be made available to local programs or the State. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid;

(2) To adopt rules and regulations for the inspection, registration and licensing of facilities for the mentally ill, mentally retarded and substance abusers, under Article 1A of Chapter 122 of the General Statutes.

(3) To advise the Secretary of the Department of Human Resources regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:

a. Mental illness and mental health,
b. Mental retardation,
c. Alcohol abuse, and
d. Drug abuse;

(4) To review and advise the Secretary of the Department of Human Resources regarding all State plans required by federal or State law and to recommend to the Secretary any changes it thinks necessary in those plans; provided, however, for the purposes of meeting State plan requirements under federal or State law, the Department of Human Resources is designated as the single State agency responsible for administration of plans involving mental health, mental retardation, alcohol abuse, and drug abuse services;

(5) To establish standards and adopt rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances as provided by G.S. 90-100, after consultation regarding these standards with a licensed physician named by the chairman of the Commission for Mental Health, Mental Retardation and Substance Abuse Services.

(6) To adopt rules to establish the professional requirements for staff of licensed facilities for the mentally ill, mentally retarded and substance abusers. Such rules may require that one or more, but not all staff of a facility be either licensed or certified. If a facility has only one professional staff, such rules may require that that individual be licensed or certified. Such rules may include the recognition of professional certification boards for those professions not licensed or certified under other provisions of the General Statutes provided that the professional certification board evaluates applicants on a basis which protects the public health, safety or welfare.

(1973, c. 476, s. 129; 1977, c. 568, ss. 2, 3; c. 679, s. 1; 1981, c. 51, s. 1; 1983, c. 718, s. 5; 1983 (Reg. Sess., 1984), c. 1110, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 15, provides: "The Department of Human Resources is directed to conduct an evaluation of the effects of the provisions of this bill on the availability, utilization, cost and quality of chemical dependency treatment in North Carolina. The Department shall present an interim report to the 1987 General Assembly and a final report to the 1989 General Assembly."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subdivision (a)(6).

Part 10. North Carolina Medical Care Commission.

§ 143B-165. North Carolina Medical Care Commission — creation, powers and duties.

There is hereby created the North Carolina Medical Care Commission of the Department of Human Resources with the power and duty to promulgate rules and regulations to be followed in the construction and maintenance of public and private hospitals, medical centers, and related facilities with the power and duty to adopt, amend and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article.

(11) The Commission is authorized to adopt such rules as may be necessary to carry out the provisions of Part C of Article 6, and Article 10, of Chapter 131E of the General Statutes of North Carolina. (1973, c.

476, s. 148; c. 1090, s. 2; c. 1224, s. 3; 1981, c. 614, s. 10; 1981 (Reg. Sess., 1982), c. 1388, s. 3; 1983 (Reg. Sess., 1984), c. 1022, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1022, s. 8, makes the act effective from November 1, 1984, through June 30, 1987.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective from November 1, 1984 to June 30, 1987, added subdivision (11).

Part 27. Governor's Waste Management Board.

§ 143B-216.10. Declaration of findings.

Legal Periodicals. — For comment on North Carolina's 1981 Waste Management Act, see 5 Camp. L. Rev. 337 (1983).

§ 143B-216.13. Functions and powers of Board.

The Board shall perform the functions and be empowered as follows:

(7) The Board shall prepare and file jointly with the Governor and the General Assembly an annual report describing the Board's activities and setting forth its recommendations for administrative or regulatory action required to improve the State's comprehensive waste management system or remedy noted defects in the system. A special report shall be filed in January of 1983 which shall include an evaluation on the possible need to organize State agencies more efficiently to improve overall performance of waste management functions. The report should give consideration to the advantages and disadvantages of consolidating or centralizing administration of programs that are now in separate agencies.

The Board shall provide a report to the General Assembly by February 1, 1985, to include:

a. An analysis of the size, type and number of hazardous waste facilities needed in North Carolina and a plan to meet these needs;

b. An analysis of the system of collection of hazardous waste in North Carolina, recommendations as to how that system might be improved and a plan to implement these recommendations; and

c. An analysis of the cost incurred by local government because of the presence of a hazardous waste facility, a hazardous waste landfill facility or a comprehensive hazardous waste treatment facility.

(17) The Board shall certify comprehensive hazardous waste treatment facilities which meet the criteria prescribed in G.S. 130A-290(1). (1981, c. 704, s. 3; 1983 (Reg. Sess., 1984), c. 973, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 26, 1984, added the second paragraph of subdivision (7) and added subdivision (17).

ARTICLE 4.

Department of Revenue.

Part 2. Property Tax Commission.

§ 143B-222. Property Tax Commission — creation, powers and duties.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

ARTICLE 6.

Department of Correction.

Part 3. Parole Commission.

§ 143B-267. (Effective July 1, 1985) Parole Commission — members; selection; removal; chairman; compensation; quorum; services.

The Parole Commission shall consist of five full-time members. The five full-time members shall be appointed by the Governor from persons whose recognized ability, training, experience, and character qualify them for service on the Commission. The terms of office of the five members presently serving on the Commission shall expire on June 30, 1977. Thereafter, the terms of office of persons appointed by the Governor as members of the Commission shall be for four years or until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, removal, death or disability of a full-time member shall be for the balance of the unexpired term only.

The Governor shall have the authority to remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance, pursuant to the provisions of G.S. 143B-13. The Governor shall designate a full-time member of the Commission to serve as chairman of the Commission at the pleasure of the Governor.

With regard to the transaction of the business of the Commission the following procedure shall be followed: The chairman shall designate panels of two voting commission members and shall designate a third commissioner to serve as an alternate member of a panel. Insofar as practicable, the chairman shall assign the members to panels in such fashion that each commissioner sits a substantially equal number of times with each other commissioner. Whenever any matter of business, such as the granting, denying, revoking or rescinding of parole, or the authorization of work-release privileges to a prisoner, shall come before the Commission for consideration and action, the chairman shall refer such matter to a panel. Action may be taken by concurring vote of the two sitting panel members. If there is not a concurring vote of the two panel members, the matter will be referred to the alternate member who shall cast the deciding vote. However, no person serving a sentence of life imprisonment shall be granted parole or work-release privileges except by majority vote of the full commission.

The full-time members of the Commission shall receive the salary fixed by the General Assembly in the Current Operations Appropriations Act and shall

receive necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-6.

All clerical and other services required by the Commission shall be supplied by the Secretary of Correction. (1973, c. 1262, s. 9; 1977, c. 704, s. 1; 1979, c. 2; 1983, c. 709, s. 3; c. 717, s. 80; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in the next-to-last paragraph of this section.

Article 7.

Department of Natural Resources and Community Development.

Part 1. General Provisions.

§ 143B-279. Department of Natural Resources and Community Development — organization.

The Department of Natural Resources and Community Development shall be organized initially to include:

(1) The Board of Natural Resources and Community Development,
(2) The Wildlife Resources Commission,
(3) The Environmental Management Commission,
(4) The Marine Fisheries Commission,
(5) The North Carolina Mining Commission,
(6) The State Soil and Water Conservation Commission,
(7) The Sedimentation Control Commission,
(8) The Wastewater Treatment Plant Operators Certification Commission,
(9) Repealed by Session Laws 1983, c. 667, s. 1, effective July 1, 1983.
(10) The Community Development Council,
(11) The Forestry Council,
(12) The Parks and Recreation Council,
(13) The North Carolina Zoological Park Council,
(14) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 12, effective June 27, 1984.
(15) The Air Quality Council,
(16) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 14, effective June 27, 1984.
(17) The North Carolina Employment and Training Council,
(18) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 11, effective June 27, 1984.
(19) The John H. Kerr Reservoir Committee,
(20) The North Carolina Trails Committee, and

such divisions as may be established under the provisions of Article 1 of this Chapter. (1973, c. 1262, s. 15; 1977, c. 771, s. 3; 1981, c. 881, s. 4; 1983, c. 667, s. 1; 1983 (Reg. Sess., 1984), c. 995, ss. 11, 12, 14; c. 1082, s. 1.)

Effect of Amendments. —
The 1983 (Reg. Sess., 1984) amendment by c. 995, effective June 27, 1984, deleted subdivision (14), relating to the Water Safety Council, subdivision (16), relating to the Water Quality Council, and subdivision (18), relating to the Commercial and Sports Fisheries Committee.

The 1983 (Reg. Sess., 1984) amendment by c. 1082, effective July 5, 1984, also deleted subdivision (14).

Part 14. North Carolina Water Safety Council.

§§ 143B-314 to 143B-316: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 12, effective June 27, 1984.

Editor's Note. — Repealed §§ 143B-314 to 143B-316 were also repealed by Session Laws 1983 (Reg. Sess., 1984), c. 1082, s. 1, effective July 5, 1984.

Part 16. Water Quality Council.

§§ 143B-320, 143B-321: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 14, effective June 27, 1984.

Part 18. Commercial and Sports Fisheries Advisory Committee.

§§ 143B-325 to 143B-327: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 11, effective June 27, 1984.

Part 25. Triad Park Commission.

§§ 143B-342 to 143B-344.2: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 13, effective June 27, 1984.

Article 8.

Department of Transportation.

Part 1. General Provisions.

§ 143B-346. Department of Transportation — purpose and functions.

CASE NOTES

Applied in Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

ARTICLE 9.

Department of Administration.

Part 14A. Governor's Advocacy Council for Persons with Disabilities.

§ 143B-403.1. Governor's Advocacy Council for Persons with Disabilities — creation; powers and duties.

There is hereby created the Governor's Advocacy Council for Persons with Disabilities of the Department of Administration. The Council shall have the following functions and duties:

(10a) To initiate public awareness projects and to make recommendations to the Governor concerning broad policies pertaining to rehabilitation for disabled persons;

(1977, c. 822, s. 1; 1979, c. 575; 1983 (Reg. Sess., 1984), c. 995, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, inserted new subdivision (10a).

Part 15A. North Carolina Advisory Council on the Eastern Band of the Cherokee.

§ 143B-411.1. North Carolina Advisory Council on the Eastern Band of the Cherokee — creation; membership; terms of office.

The North Carolina Advisory Council on the Eastern Band of the Cherokee is created in the Department of Administration. The Council shall consist of 16 members and shall include the following members: eight members shall be appointed by the Chief with the consent of the Tribal Council of the Eastern Band of the Cherokee; the Superintendent of Public Instruction or his designee; the Secretary of Administration or his designee; the Secretary of Human Resources or his designee; the Secretary of Natural Resources and Community Development or his designee; the Attorney General or his designee; one member appointed by the Governor who shall be a representative of local government in Swain, Jackson, or Cherokee Counties; one legislator appointed by the Speaker of the House; and one legislator appointed by the President Pro Tempore of the Senate. Members serving by virtue of their office within State Government shall serve so long as they hold that office, except that the members appointed by the Speaker of the House and the President Pro Tempore of the Senate shall serve for two-year terms. Members appointed by the Chief shall serve at the pleasure of the Chief. Members appointed by the Governor shall serve a term of four years at the pleasure of the Governor. (1983 (Reg. Sess., 1984), c. 1085, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1085, s. 2, makes this Part effective upon ratification. It further provides that the members of the Governor's Cherokee Task Force shall continue to serve until all appointments to the Advisory Council are made. The act was ratified July 5, 1984.

§ 143B-411.2. North Carolina Advisory Council on the Eastern Band of the Cherokee — purpose or creation; powers and duties.

The purpose of the Council is to study on a continuing basis the relationship between the Eastern Band of the Cherokee and the State of North Carolina in order to resolve any matters of concern to the State or the Tribe. It shall be the duty of the Council:

(1) Identify existing and potential conflicts between the State of North Carolina and the Eastern Band of Cherokee Indians;

(2) Propose State and federal legislation and agreements between the State of North Carolina and the Cherokee Tribe to resolve existing and potential conflicts;

(3) To study and make recommendations concerning any issue referred to the Council by any official of the Eastern Band of the Cherokee, the State of North Carolina, or the government of Haywood, Jackson, Swain, Graham, or Cherokee Counties.

(4) Study other issues of mutual concern to the Eastern Band of the Cherokee;

(5) Make a report with recommendations as needed, but not less often than biannually to the Governor, the Chief of the Eastern Band of the Cherokee, the General Assembly, and the Tribal Council of the Eastern Band of the Cherokee. (1983 (Reg. Sess., 1984), c. 1085, s. 1.)

§ 143B-411.3. North Carolina Advisory Council of the Eastern Band of the Cherokee — meetings; quorum; compensation; chairman.

The Council shall meet at least quarterly or at the call of the chairman or a majority of the Council. A quorum shall consist of a majority of the Council. Designees of Council members serving by virtue of office shall be entitled to vote. The Chairman of the Council shall be elected from the membership. The selection of a member as chairman shall have no effect on the member's voting privileges. Council members who are seated by virtue of their office within State government shall be compensated at the rate specified in G.S. 138-6. Council members who are members of the General Assembly shall be compensated at the rate specified in G.S. 120-31. Other Council members shall be compensated at the rate specified in G.S. 138-5. (1983 (Reg. Sess., 1984), c. 1085, s. 1.)

§ 143B-411.4. North Carolina Advisory Council on the Eastern Band of the Cherokee — clerical and administrative support.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1983 (Reg. Sess., 1984), c. 1085, s. 1.)

Part 22. North Carolina Agency for Public Telecommunications.

§ 143B-426.9. North Carolina Agency for Public Telecommunications — creation; membership; appointments, terms and vacancies; officers; meetings and quorum; compensation.

The North Carolina Agency for Public Telecommunications is created. It is governed by the Board of Public Telecommunications Commissioners, composed of 27 members as follows:

(1) A Chairman appointed by, and serving at the pleasure of, the Governor;
(2) Ten at-large members, appointed by the Governor from the general public;
(3) Two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121;
(4) Two members appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121;
(5) The Secretary of Administration, ex officio;
(6) The Chairman of the Board of Trustees of The University of North Carolina Center for Public Television (if and when established), ex officio;
(7) The Chairman of the State Board of Education, ex officio;
(8) The Chairman of the OPEN/net Committee, ex officio, so long as such person is not a State employee;
(9) The Chairman of the North Carolina Utilities Commission, ex officio;
(10) The Director of the Public Staff of the North Carolina Utilities Commission, ex officio;
(11) The Chairman of the Public Radio Advisory Committee of the North Carolina Agency for Public Telecommunications, ex officio;
(12) The Superintendent of Public Instruction, ex officio;
(13) The President of the University of North Carolina, ex officio;
(14) The President of the Department of Community Colleges, ex officio; and
(15) Two members ex officio who shall rotate from among the remaining heads of departments enumerated in G.S. 143A-11 or G.S. 143B-6, appointed by the Governor.

The 10 at-large members shall serve for terms staggered as follows: four terms shall expire on June 30, 1980; and three terms shall expire on June 30, 1982; and three terms shall expire on June 30, 1984. Thereafter, the members at large shall be appointed for full four-year terms and until their successors are appointed and qualified. In making appointments of members at large, the Governor shall seek to appoint persons from the various geographic areas of the State including both urban and rural areas; persons from various classifications as to sex, race, age, and handicapped persons; and persons who are representatives of the public broadcast, commercial broadcast, nonbroadcast distributive systems and private education communities of the State.

The terms of the ex officio members are coterminous with their respective terms of office. In the event that any of the offices represented on the Board ceases to exist, the successor officer to the designated member shall become an ex officio member of the Board; if there shall be no successor, then the position on the Board shall be filled by a member to be appointed by the Governor from the general public. The ex officio members shall have the right to vote.

The initial members appointed to the Board by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years.

The terms of the rotating ex officio members shall be of one-year duration, and the schedule of rotation is determined by the Governor.

Each State official who serves on the Board may designate a representative of his department, agency or institution to sit in his place on the Board and to exercise fully the official's privileges of membership.

The Secretary of Administration or his designee serves as secretary of the Board.

Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies shall be filled in the same manner as the original appointment.

The Governor may remove any member of the Board from office in accordance with the provisions of G.S. 143B-16.

The Board meets quarterly and at other times at the call of the chairman or upon written request of at least six members.

A majority of the Board members shall constitute a quorum for the transaction of business. (1979, c. 900, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 6-8; 1983 (Reg. Sess., 1984), c. 1116, s. 92.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, rewrote subdivision (8), which formerly read "The Chairman of the North Carolina Privacy and Freedom of Information Commission (if and when established), ex officio."

§ 143B-426.11. (Effective July 1, 1985) Powers of Agency.

In order to enable it to carry out the purposes of this Part, the Agency:

(1) Has the powers of a body corporate, including the power to sue and be sued, to make contracts, to hold and own copyrights and to adopt and use a common seal and to alter the same as may be deemed expedient;

(2) May make all necessary contracts and arrangements with any parties which will serve the purposes and facilitate the business of the North Carolina Agency for Public Telecommunications; except that, the Agency may not contract or enter into any agreement for the production by the Agency of programs or programming materials with any person, group, or organization other than government agencies; principal State departments; public and noncommercial broadcast licensees;

(3) May rent, lease, buy, own, acquire, mortgage, or otherwise encumber and dispose of such property, real or personal; and construct, maintain, equip and operate any facilities, buildings, studios, equipment, materials, supplies and systems as said Board may deem proper to carry out the purposes and provisions of this Part;

(4) May establish an office for the transaction of its business at such place or places as the Board deems advisable or necessary in carrying out the purposes of this Part;

(5) May apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources for any and all of the purposes authorized in this Part; may extend or distribute the funds in accordance with directions and requirements attached thereto or imposed thereon by the federal agency, the State of North Carolina or any political subdivision thereof, or any public or private lender or

donor; and may give such evidences of indebtedness as shall be required, but no indebtedness of any kind incurred or created by the Agency shall constitute an indebtedness of the State of North Carolina or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina or any political subdivision thereof. At no time may the total outstanding indebtedness of the Agency, excluding bond indebtedness, exceed five hundred thousand dollars ($500,000) without approval of the Advisory Budget Commission;

(6) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Agency and incident to the administration and operation thereof, and may pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Part;

(7) Subject to the approval of the Advisory Budget Commission and under such conditions as the Board may deem appropriate to the accomplishment of the purposes of this Part, may distribute in the form of grants, gifts, or loans any of the revenues and earnings received by the Agency from its operations;

(8) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be exercised, and may provide for the creation of such divisions and for the appointment of such committees, and the functions thereof, as the Board deems necessary or expedient in facilitating the business and purposes of the Agency;

(9) The Board shall be responsible for all management functions of the Agency. The chairman shall serve as the chief executive officer, and shall have the responsibility of executing the policies of the Board. The Executive Director shall be the chief operating and administrative officer and shall be responsible for carrying out the decisions made by the Board and its chairman. The Executive Director shall be appointed by the Governor upon the recommendation of the Board and shall serve at the pleasure of the Governor. The salary of the Executive Director shall be fixed by the General Assembly in the Current Operations Appropriations Act. Subject to the provisions of the State Personnel Act and with the approval of the Board, the Executive Director may appoint, employ, dismiss and fix the compensation of such professional, administrative, clerical and other employees as the Board deems necessary to carry out the purposes of this Part; but any employee who serves as the director of any division of the agency which may be established by the Board shall be appointed with the additional approval of the Secretary of Administration. There shall be an executive committee consisting of three of the appointed members and three of the ex officio members elected by the Board and the chairman of the Board, who shall serve as chairman of the executive committee. The executive committee may do all acts which are authorized by the bylaws of the Agency. Members of the executive committee shall serve until their successors are elected;

(10) May do any and all other acts and things in this Part authorized or required to be done, whether or not included in the general powers in this section; and

(11) May do any and all things necessary to accomplish the purposes of this Part.

Nothing herein authorizes the Agency to exercise any control over any public noncommercial broadcast licensee, its staff or facilities or over any community antenna television system (Cable TV; CATV), its staff, employees or facilities

operating in North Carolina, or the Police Information Network (PIN), its staff, employees or facilities or the Judicial Department.

The property of the Agency shall not be subject to any taxes or assessments. (1979, c. 900, s. 1; 1983, c. 666; c. 717, s. 82; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in subdivision (9) of this section.

Article 10.

Department of Commerce.

Part 11. North Carolina Ports Railway Commission.

§ 143B-469.1. (Effective July 1, 1985) Powers of Commission.

The Commission shall be an agency of the State with all the powers of a body corporate including the following:

(1) To sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient;

(2) To rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of all such property, real or personal, as the Commission may deem necessary;

(3) To operate, maintain and control all railway equipment and railway operations transferred to it by the State Ports Authority;

(4) To acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports terminal railroads in addition to those transferred to it by the State Ports Authority with necessary sidings, turnouts, spurs, branches, switches, yard tracks, bridges, trestles, and causeways and in connection therewith shall have the further right to lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyances or appliances necessary or proper to carry goods, wares and merchandise over, along or upon the track of such railway or other conveyance;

(5) To make agreements as to scale of wages, seniority and working conditions with railroad employees, including but not limited to, locomotive engineers, locomotive firemen, switchmen, switch engine foremen and hostlers engaged in the operation and servicing of the terminal railways and their equipment;

(6) To connect with or cross any other railway upon payment of just compensation and to receive, deliver to and transport the freight, passengers and the cars of common carrier railroads as though it were an ordinary common carrier;

(7) To appoint, with the approval of the Governor, a general manager of the Commission who shall serve at the pleasure of the board. The salary for the general manager shall be fixed by the General Assembly in the Current Operations Appropriations Act. The general manager

shall have the authority to appoint, employ and dismiss such number of employees as may be deemed necessary by the board to accomplish the purposes of this Article. The compensation of such employees shall be fixed by the board;

(8) To establish an office for the transaction of its business at such place or places, as in the opinion of the Commission, shall be advisable or necessary in carrying out the purposes of this Part;

(9) To pay all necessary costs and expenses involved in and incident to the formation and organization of the Commission, and incident to the administration and operation thereof, and to pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Part;

(10) To apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources available for any and all of the purposes authorized in this Article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the State of North Carolina, or any political subdivision thereof, or any public or private lender or donor, and to give such evidences of indebtedness as shall be required, provided, however, that no indebtedness of any kind incurred or created by the Commission shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing powers of the State, or any political subdivision thereof;

(11) To act as agent for the United States of America, or any agency, department, corporation or instrumentality thereof, in any manner coming within the purposes or powers of the Commission;

(12) To acquire rights-of-way and the property necessary for the construction of administration buildings, equipment, servicing facilities, terminal railways and structures, railway crossings, bridges and causeways by purchase, by negotiation or by condemnation, and should the Commission elect to exercise the right of eminent domain, condemnation proceedings shall be maintained by and in the name of the Commission, and it may proceed in any manner provided for by the general laws of this State;

(13) To do any and all things necessary to carry out and accomplish the purposes of this Article. (1979, c. 159, s. 1; 1983, c. 717, s. 85; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the Replacement Volume and the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in subdivision (7) of this section.

Part 11A.

North Carolina Hazardous Waste Treatment Commission.

§ 143B-470. Declaration of findings.

The General Assembly of North Carolina hereby finds and declares that the safe management of hazardous waste, and particularly the timely establishment of adequate facilities for the disposal and management of hazardous waste, is one of the most urgent problems facing North Carolina. The safe management and disposal of hazardous wastes are essential to continued economic growth and for protection of the public health and safety and the environment. Consequently, cooperation and coordination among the private sector, the general public and State and local agencies to assure the prevention of unnecessary waste and the establishment of a comprehensive and integrated system of adequate treatment and disposal facilities are essential.

The General Assembly of North Carolina finds and declares that prevention, recycling, detoxification and reduction of hazardous wastes should be encouraged and promoted. These are alternatives which ultimately remove such wastes' hazards to human health and the environment. When these alternatives are not technologically or economically feasible, long-term retrievable storage is preferable to other means of disposal until appropriate methods for recycling or detoxification of the stored wastes are found. Hazardous waste shall be treated prior to disposal or long-term storage in North Carolina. Long-term storage or disposal shall be used for the storage or disposal of the residual or ashes of hazardous waste which has been treated so that the toxicity is low enough to present no significant health or safety hazard in the event of leakage from the facility. Hazardous waste that cannot be reduced, stabilized or destroyed to the extent which renders it sufficiently low in toxicity as to present no significant health or safety hazard shall be stored in long-term retrievable storage until such methods are found. Hazardous waste in long-term retrievable storage shall be detoxified as soon as the Commission for Health Services determines, based upon a preponderance of the evidence, that the technology is available at a reasonable cost. Hazardous waste landfill facilities and polychlorinated biphenyl landfill facilities shall be detoxified as soon as economically feasible technology is available and sufficient money is available without additional appropriation. The General Assembly further finds that hazardous wastes shall be treated and disposed of in the most cost-effective manner while protecting public health and safety and the environment. (1983 (Reg. Sess., 1984), c. 973, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 973, s. 10, makes this Article effective upon ratification. The act was ratified June 26, 1984.

§ 143B-470.1. Declaration of purposes.

It is the purpose of this Part to provide for the siting, construction and operation of comprehensive hazardous waste management facilities to the end that hazardous waste may be treated or disposed of in the most cost-effective manner, while protecting public health and safety and the environment. It is also the purpose of the General Assembly to create a Commission to site, finance, build, lease or operate, or oversee a hazardous waste treatment facility if private enterprise fails to do so within a specified time. It is also the purpose of the General Assembly through powers granted to the Governor's Waste Management Board to place limitations upon the exercise by all units of local government in North Carolina of the power to regulate the management of

hazardous waste by means of special local or private acts or resolutions, ordinances, property restrictions, zoning laws, rules and regulations, fire laws, rules and regulations, civil defense laws, rules and regulations, public health laws, rules and regulations, building codes, and otherwise. (1983 (Reg. Sess., 1984), c. 973, s. 1.)

§ 143B-470.2. Definitions.

Unless the context otherwise requires, the following definitions shall apply to this Part:

(1) "Federal act" means the Resource Conservation and Recovery Act of 1976, P.L. 94-580, as amended; codified in Chapter 82 of Title 42 of the United States Code, as amended.

(2) "Hazardous waste" means a solid waste, or combination of solid wastes, as solid waste is defined in G.S. 130A-290(18), which because of its quantity, concentration or physical, chemical or infectious characteristics may:

a. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or

b. Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

(3) "Hazardous waste treatment facility" means a facility which is established, constructed, financed, sited and operated in accordance with this Part for the recovery, recycling, treatment, storage during collection and prior to treatment, short term storage after treatment, collection, processing, volume reduction, source separation, or transportation used exclusively in connection with the facility, of hazardous waste; and which facility includes several of the following equipments and processes: incinerators, rotary kilns, drum handling, washing and crushing facilities, raw waste tank storage, reduction, neutralization, detoxification, wastewater treatment facilities including settling systems, aerobic digesters, anaerobic digesters, clarifiers, neutralization facilities, solidifying facilities, evaporators, reactions to facilitate "reuse" or recycling, analytical capabilities, and other similar appropriate technologies, activities and processes as may now exist or be developed in the future.

(4) "Hazardous waste generation" means the act or process of producing hazardous waste.

(5) "Hazardous waste long-term storage facility" means any facility or any portion of a facility constructed pursuant to the rules adopted under this Part for storage of the residuals of the treatment of hazardous waste, on or in land.

(6) "Hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery and disposal of hazardous wastes.

(7) "Long-term retrievable storage" means storage in closed containers in facilities (either above or below ground) with (i) adequate lights, (ii) impervious cement floors, (iii) strong visible shelves or platforms, (iv) passageways to allow inspection at any time, (v) adequate ventilation if underground or in closed buildings, (vi) protection from the weather, (vii) accessible to monitoring with signs on both individual containers and sections of storage facilites, and (viii) adequate safety and security precautions for facility personnel, inspectors and invited or permitted members of the community.

(8) "Manifest" means the form used for identifying the quantity, composition, origin, routing and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment or storage.
(9) "Notice" shall include any written notice made in accordance with the provisions of G.S. 1A-1, Rule 4 of the North Carolina Rules of Civil Procedure, or any notice provision under this Article or the federal act.
(10) "Operated" includes any phase of the planning, application, siting, financing, construction, operating and maintaining of the hazardous waste treatment facility.
(11) "Person" means an individual, corporation, company, association, partnership, unit of local government, State agency, federal agency, or other legal entity.
(12) "Recycling" means the process by which recovered resources are transformed into new products so that the original products lose their identity.
(13) "Reuse" means a process by which resources are reused or rendered usable.
(14) "Surface impoundment" or "impoundment" means a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of hazardous waste(s) containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds and lagoons.
(15) "Treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical or biological character, form or composition of any solid waste so as to neutralize the waste or to render the waste nonhazardous or less hazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. The term includes any activity or processing designed to change the physical form or chemical composition of solid waste to render it nonhazardous.
(16) "Treatment Commission" means the North Carolina Hazardous Waste Treatment Commission created by this Part.
(17) "Unit of local government" means a county, city, town or incorporated village. (1983 (Reg. Sess., 1984), c. 973, s. 1.)

§ 143B-470.3. Creation of Commission.

Membership, appointment, terms and vacancies, officers, meetings and quorum, compensation.

The North Carolina Hazardous Waste Treatment Commission is created. It shall be governed by a board composed of nine members herein referred to as the Treatment Commission. Members of the General Assembly shall be ineligible for appointment to membership on the Treatment Commission. The Governor shall appoint three members of the Treatment Commission, and the General Assembly shall appoint six members of the Treatment Commission.

The initial appointments by the Governor shall be made on or after January 31, 1985, one term to expire January 31, 1989, and two terms to expire January 31, 1987. Thereafter, at the expiration of each stipulated term of office all appointments made by the Governor shall be for a term of four years. The members of the Treatment Commission appointed by the Governor shall be selected from the State at large and insofar as practicable shall represent each geographic section of the State and the industrial and environmental interests of the State. Any vacancy occurring in the membership of the Treatment

Commission appointed by the Governor shall be filled by the Governor for the unexpired term. The Governor shall have the authority to remove any member appointed by the Governor.

The General Assembly shall appoint three persons to serve terms expiring January 31, 1987. The General Assembly shall appoint three persons to serve terms expiring January 31, 1989. Successors shall serve for four-year terms. Of the three persons whose terms are to expire in 1987, two shall be appointed upon the recommendation of the President of the Senate and one shall be appointed upon the recommendation of the Speaker. Of the three persons whose terms are to expire in 1989, two shall be appointed upon the recommendation of the Speaker and one shall be appointed upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The members of the Treatment Commission appointed by the General Assembly shall be selected from the State at large and insofar as practicable shall represent each geographic section of the State and the industrial and environmental interests of the State. The General Assembly shall have the authority to remove any member appointed by the General Assembly. No member shall serve more than two consecutive four-year terms.

The Governor shall appoint from the members of the Treatment Commission the Chairman and Vice-Chairman of the Treatment Commission. The Secretary of Commerce or his designee shall serve as secretary of the Treatment Commission. The members of the Treatment Commission shall appoint a treasurer of the Treatment Commission. The Department of Commerce shall use funds already appropriated to the Department to implement this Part.

Should any one of the appointing authorities fail to make appointments by March 1, 1985, or in the event that the Chairman and Vice-Chairman of the Commission are not appointed by that date, the Treatment Commission shall proceed to elect officers and begin operation.

The Treatment Commission shall meet once in each 60 days at such regular meeting time as the Treatment Commission by rule may provide and at any place within the State as the Treatment Commission may provide, and shall also meet upon the call of its chairman or a majority of its members. A majority of its members shall constitute a quorum for the transaction of business. The members of the Treatment Commission shall not be entitled to compensation for their services, but they shall receive per diem and necessary travel and subsistence expense in accordance with G.S. 138-5. (1983 (Reg. Sess., 1984), c. 973, s. 1.)

§ 143B-470.4. Powers and duties of the Treatment Commission.

(a) To carry out the purposes of this Part, the Treatment Commission:

(1) May exercise the powers of a body corporate, including the power to sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient;

(2) May make all necessary contracts and arrangements with other authorities of this and other states for any other purposes of the Treatment Commission;

(3) May rent, lease, buy, own, acquire, mortgage, or otherwise encumber, and dispose of real or personal property;

(4) Shall establish an office for the transaction of its business at such place or places as, in the opinion of the Treatment Commission, shall be advisable or necessary in carrying out the purposes of this Part;

(5) May create and operate any divisions it deems necessary or useful;

(6) May pay all costs of the formation and organization of the Treatment Commission, and incident to its administration and operation, and may pay all other costs necessary in carrying out and accomplishing the purposes of this Part;

(7) May apply for, accept and expend loans and grants of money from any federal agency or the State or any political subdivision thereof or from any public or private sources available for any of the purposes authorized in this Part, and to give any evidences of indebtedness as may be required. No indebtedness of any kind incurred or created by the Treatment Commission shall constitute an indebtedness of the State or any of its political subdivisions, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State or any of its political subdivision. At no time may the total outstanding indebtedness of the Treatment Commission, excluding bond indebtedness, exceed a total of five hundred thousand dollars ($500,000) without approval of the Governor, after receiving the advice of the Advisory Budget Commission;

(8) May appoint an Executive Director, who shall report to the Treatment Commission and serve at the pleasure of the Treatment Commission. The Executive Director with the approval of the Treatment Commission shall appoint such management personnel as he deems necessary to serve at his pleasure. They shall report to the Executive Director. The salaries of these personnel shall be fixed by the Governor with the approval of the Advisory Budget Commission. The Executive Director or his designee shall appoint, employ, dismiss and, within the limits of available funding, fix the compensation of such other employees as he deems necessary to carry out the purposes of this Part. There shall be an executive committee consisting of the chairman of the Treatment Commission and two other members elected annually by the Treatment Commission. The executive committee shall be vested with the authority to do all acts which are authorized by the bylaws of the Treatment Commission. Members of the executive committee shall serve until their successors are elected;

(9) May act as agent for the United States of America, or any of its agencies, departments, corporations, or instrumentalities, in any matter coming within the purposes or powers of the Treatment Commission;

(10) May, pursuant to Article 2 of Chapter 150A of the General Statutes, adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be enjoyed, and may provide for the appointment of any committees, and the functions thereof;

(11) May do anything necessary to accomplish the purposes of this Part.

The property of the Treatment Commission shall not be subject to any taxes or assessments.

(b) If no permit to operate a hazardous waste treatment facility has been issued to a private operator by June 1, 1985, the Treatment Commission shall actively seek communities interested in hosting hazardous waste treatment facilities and private operators of hazardous waste treatment facilities and shall present appropriate sites, as prescribed in G.S. 130A-294(g), to those operators. If no permit to operate a hazardous waste treatment facility has been issued to a private operator by January 1, 1986, the Treatment Commission shall, on the basis of the criteria and procedures outlined in G.S. 130A-294(g), select appropriate site(s) and begin proceedings to purchase or if necessary condemn property for such site(s) under the State's power of eminent domain.

Condemnation shall be upon the same terms and procedures as set forth in Article 9 of Chapter 136 of the General Statutes of North Carolina, except that the Treatment Commission shall have the same rights, duties, and responsibilities as set forth for the North Carolina Department of Transportation. The purposes for which the power of eminent domain is used in this section are to enable a hazardous waste treatment facility to be built which will manage hazardous waste generated by the public or by private industry in making goods for the benefit of the public, and are, therefore, public purposes for these and related purposes. The Treatment Commission shall then actively seek private operators of hazardous waste treatment facilities and shall contract with at least one operator to purchase the site and construct a hazardous waste treatment facility. If no permit to operate a hazardous waste treatment facility has been issued by June 1, 1986, the Treatment Commission shall submit to the General Assembly plans for construction of a facility on one of the sites and shall proceed to begin construction of a facility within one year and shall seek a private operator to operate the facility. If no private operator can be found, the Treatment Commission shall operate the facility.

(c) The Treatment Commission shall submit to the General Assembly by May 1, 1985, a comprehensive plan for the treatment of hazardous waste in North Carolina, including a plan to provide for a statewide hazardous waste collection system. The Governor's Waste Management Board, the Solid and Hazardous Waste Branch of the Division of Health Services of the Department of Human Resources, and other State agencies and departments shall cooperate with the Treatment Commission in preparation of the plan. If the Treatment Commission, in its report to the General Assembly, indicates that the needs of the State for treatment of hazardous waste are being met, the Treatment Commission shall cease to exist as of October 1, 1985. If not, the Treatment Commission shall report periodically to the General Assembly or, if the General Assembly is not in session, to the Joint Legislative Commission on Governmental Operations, on progress toward meeting the State's needs. (1983 (Reg. Sess., 1984), c. 973, s. 1.)

§ 143B-470.5. Issuance of bonds and notes.

(a) As a means of raising the funds needed from time to time for the acquisition, construction, equipment, maintenance or operation of any facility, building, structure or any other matter or thing which the Treatment Commission is authorized to acquire, construct, equip, maintain, or operate, all or any of them, including authorized special user projects, the Treatment Commission may borrow money and in evidence thereof may issue bonds, notes and other obligations of the Treatment Commission as provided in the Local Government Revenue Bond Act, Article 5 of Chapter 159 of the General Statutes. Bonds, notes and other obligations may also be issued to (i) establish any reserves the Treatment Commission may determine to be desirable including, without limitation, a debt service reserve fund, and (ii) provide for interest during the estimated period of construction and for a reasonable period thereafter and (iii) provide for working capital.

(b) Any obligations issued by the Treatment Commission under the provisions of this Part, their transfer and the income therefrom (including any profit made on the sale of them), shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, except inheritance or gift taxes. (1983 (Reg. Sess., 1984), c. 973, s. 1.)

ARTICLE 11.

Department of Crime Control and Public Safety.

Part 1. General Provisions.

§ 143B-475. Department of Crime Control and Public Safety — functions.

(d) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1034, s. 103.

(1977, c. 70, s. 1; 1981, c. 929; 1983, c. 832, s. 3; 1983 (Reg. Sess., 1984), c. 1034, s. 103.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — For section providing for a deferred prosecution, community service restitution, and volunteer program, see now § 143B-475.1.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, deleted subsection (d), which read "The Department of Crime Control and Public Safety may conduct a deferred prosecution, community service restitution and volunteer program for youthful and adult offenders if funds are available."

§ 143B-475.1. Deferred prosecution, community service restitution, and volunteer program.

(a) The Department of Crime Control and Public Safety may conduct a deferred prosecution, community service restitution, and volunteer program for youthful and adult offenders. The Secretary of Crime Control and Public Safety may assign one or more coordinators to each judicial district to assure and report to the Court the offender's compliance with the requirements of the program. The appointment of each coordinator is subject to the approval of the chief district court judge. Each county must provide office space in the courthouse or other convenient place, for the use of each coordinator assigned to that county.

(b) A fee of fifty dollars ($50.00) shall be paid by all persons required to participate in the program. That fee shall be paid to an official designated for that purpose and at the time and place specified by the Secretary. Fees collected under this subsection shall be deposited in the General Fund.

(c) The Secretary is authorized to designate the same person to serve as a coordinator under this section and under G.S. 20-179.4. (1983 (Reg. Sess., 1984), c. 1034, s. 102.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Part 3. Governor's Crime Commission.

§ 143B-480. Adjunct committees of the Governor's Crime Commission — creation; purpose; powers and duties.

(a) There are hereby created by way of extension and not limitation, the following adjunct committees of the Governor's Crime Commission: the Judicial Planning Committee, the Juvenile Justice Planning Committee, the Law Enforcement Planning Committee, the Corrections Planning Committee, and the Juvenile Code Revision Committee.

(c) The adjunct committees created herein shall report directly to the Governor's Crime Commission and shall have the following powers and duties:

(1) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 8, effective June 27, 1984.

(2) The Law Enforcement Planning Committee shall advise the Governor's Crime Commission on all matters which are referred to it relevant to law enforcement, including detention; shall participate in the development of the law-enforcement component of the State's comprehensive plan; shall consider and recommend priorities for the improvement of law-enforcement services; and shall offer technical assistance to State and local agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of law-enforcement services.

The Law Enforcement Planning Committee shall maintain contact with the National Commission on Accreditation for Law Enforcement Agencies, assist the National Commission in the furtherance of its efforts, adapt the work of the National Commission by an analysis of law-enforcement agencies in North Carolina, develop standards for the accreditation of law-enforcement agencies in North Carolina, make these standards available to those law-enforcement agencies which desire to participate voluntarily in the accreditation program, and assist participants to achieve voluntary compliance with the standards.

(3) The Judicial Planning Committee (which shall be appointed by the Supreme Court) shall establish court improvement priorities, define court improvement programs and projects, and develop an annual judicial plan in accordance with the Crime Control Act of 1976 (Public Law 94-503); shall advise the Governor's Crime Commission on all matters which are referred to it relevant to the courts; shall consider and recommend priorities for the improvement of judicial services; and shall offer technical assistance to State agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of judicial services.

(4) The Corrections Planning Committee shall advise the Governor's Crime Commission on all matters which are referred to it relevant to corrections; shall participate in the development of the adult corrections component of the State's comprehensive plan; shall consider and recommend priorities for the improvement of correction services; and shall offer technical assistance to State agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of corrections.

(5) The Juvenile Justice Planning Committee shall advise the Governor's Crime Commission on all matters which are referred to it relevant to juvenile justice; shall participate in the development of the juvenile

justice component of the State's comprehensive plan; shall consider and recommend priorities for the improvement of juvenile justice services; and shall offer technical assistance to State and local agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of juvenile justice.

(6) The Juvenile Code Revision Committee shall study problems relating to young people who come within the juvenile jurisdiction of the district court as defined by Article 23 of Chapter 7A of the General Statutes and develop a legislative plan which will best serve the needs of young people and protect the interests of the State; shall study the existing laws, services, agencies and commissions and recommend whether they should be continued, amended, abolished or merged; and shall take steps to insure that all agencies, organizations, and private citizens in the State of North Carolina have an opportunity to lend advice and suggestions to the development of a revised juvenile code. If practical, the Committee shall submit a preliminary report to the General Assembly prior to its adjournment in 1977. It shall make a full and complete report to the General Assembly by March 1, 1979. This adjunct committee shall terminate on February 28, 1979.

(1975, c. 663; 1977, c. 11, s. 3; 1981, c. 605, s. 1; 1983 (Reg. Sess., 1984), c. 995, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective June 27, 1984, deleted "the Crime Prevention and Public Information Committee" preceding "the Judicial Planning Committee" in subsection (a), and deleted subdivision (c)(1), which set forth the powers and duties of the Crime Prevention and Public Information Committee.

Chapter 146.

State Lands.

SUBCHAPTER II. ALLOCATED STATE LANDS.

Article 6.

Acquisitions.

Sec.

146-22. All acquisitions to be made by Department of Administration.

146-25.1. Proposals to be secured for leases.

Article 7.

Dispositions.

146-30. (Effective until July 1, 1985) Application of net proceeds.

Sec.

146-30. (Effective July 1, 1985) Application of net proceeds.

Article 8.

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146-32. Exemptions as to leases, etc.

SUBCHAPTER IV. MISCELLANEOUS.

Article 16.

Form of Conveyances.

146-74. Approval of conveyances.

SUBCHAPTER I. UNALLOCATED STATE LANDS.

ARTICLE 2.

Dispositions.

§ 146-3. What lands may be sold.

CASE NOTES

Applied in State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

§ 146-6. Title to land raised from navigable water.

CASE NOTES

"Any Other Provision of This Section" Construed. — Although the language of subsection (e) is rather awkward, the reference in subsection (e) to "any other provision of this section" encompasses subsection (d) as well as subsection (a). Lackey v. Tripp, 63 N.C. App. 765, 306 S.E.2d 464, cert. denied, 309 N.C. 821, 310 S.E.2d 350 (1983).

Extension of Property Lines under Subsection (e). — Since subsection (e) is silent on how property lines are to be extended, the lines may be drawn as the Governor and Council of State in their discretion deem proper in a case controlled by subsection (e) and not by subsection (a). Lackey v. Tripp, 63 N.C. App. 765, 306 S.E.2d 464, cert. denied, 309 N.C. 821, 310 S.E.2d 350 (1983).

§ 146-12. Easements in lands covered by water.

CASE NOTES

Applied in State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

SUBCHAPTER II. ALLOCATED STATE LANDS.

ARTICLE 6.

Acquisitions.

§ 146-22. All acquisitions to be made by Department of Administration.

Every acquisition of land on behalf of the State or any State agency, whether by purchase, condemnation, lease, or rental, shall be made by the Department of Administration and approved by the Governor and Council of State; provided that if the proposed acquisition is a purchase of land with an appraised value of at least twenty-five thousand dollars ($25,000), and the acquisition is for other than a transportation purpose, the acquisition may only be made after consultation with the Joint Legislative Commission on Governmental Operations. In determining whether the appraised value is at least twenty-five thousand dollars ($25,000), the value of the property in fee simple shall be used. The State may not purchase land as a tenant-in-common without consultation with the Joint Legislative Commission on Governmental Operations if the appraised value of the property in fee simple is at least twenty-five thousand dollars ($25,000). (1957, c. 584, s. 6; G.S., s. 146-103; 1959, c. 683, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the proviso at the end of the first sentence and added the second and third sentences.

§ 146-24. Procedure for purchase or condemnation.

CASE NOTES

Stated in State v. Forehand, — N.C. App. —, 312 S.E.2d 247 (1984).

§ 146-25.1. Proposals to be secured for leases.

(a) If pursuant to G.S. 146-25, the Department of Administration determines that it is in the best interest of the State to lease or rent land and the rental is estimated to exceed twelve thousand dollars ($12,000) per year or the term will exceed three years, the Department shall require the State agency desiring to rent land to prepare and submit for its approval a set of specifications for its needs. Upon approval of specifications, the Department shall prepare a public advertisement. The State agency shall place such advertisement in a newspaper of general circulation in the county for proposals from prospective lessors of said land and shall make such other distribution thereof as the Department directs. The advertisement shall be run for at least five consecutive days, and shall provide that proposals shall be received for at least seven days from the date of the last advertisement in the State Property Office of the Department. The provisions of this section do not apply to property

owned by governmental agencies and leased to other governmental agencies.

(1973, c. 1448; 1975, c. 523; 1977, c. 485; 1979, c. 43, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, substituted "twelve thousand dollars ($12,000)" for "seven thousand five hundred dollars ($7,500)" in the first sentence of subsection (a).

Article 7.

Dispositions.

§ 146-30. (Effective until July 1, 1985) Application of net proceeds.

The net proceeds of any disposition made in accordance with this Subchapter shall be handled in accordance with the following priority: First, in accordance with the provisions of any trust or other instrument of title whereby title to such real property was heretofore acquired or is hereafter acquired; second, as provided by any other act of the General Assembly; third, the net proceeds shall be deposited with the State Treasurer. Provided, however, nothing herein shall be construed as prohibiting the disposition of any State lands by exchange for other lands, but if the appraised value in fee simple of any property involved in the exchange is at least twenty-five thousand dollars ($25,000), then such exchange may not be made without consultation within the Joint Legislative Commission on Governmental Operations.

For the purposes of this Subchapter, the term "net proceeds" means the gross amount received from the sale, lease, rental, or other disposition of any State lands, less

(1) Such expenses incurred incident to that sale, lease, rental, or other disposition as may be allowed under rules and regulations adopted by the Governor and approved by the Council of State;

(2) Amounts paid pursuant to G.S. 105-296.1, if any; and

(3) A service charge to be paid into the State Land Fund.

The amount or rate of such service charge shall be fixed by rules and regulations adopted by the Governor and approved by the Council of State, but as to any particular sale, lease, rental, or other disposition, it shall not exceed ten percent (10%) of the gross amount received from such sale, lease, rental, or other disposition. Notwithstanding any other provision of this Subchapter, the net proceeds derived from the sale of land or products of land owned by or under the supervision and control of the Wildlife Resources Commission, or acquired or purchased with funds of that Commission, shall be paid into the Wildlife Resources Fund. Provided, however, the net proceeds derived from the sale of land or timber from land owned by or under the supervision and control of the Department of Agriculture shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Agriculture, to be used for such specific capital improvement projects or other purposes as are provided by transfer of funds from those accounts in the Budget Appropriation Act. Provided further, the net proceeds derived from the sale of park land

§ 146-30 is set out twice. See section heading for effective dates.

owned by or under the supervision and control of the Department of Natural Resources and Community Development shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Administration to be used for the purpose of park land acquisition as provided by transfer of funds from those accounts in the Budget Appropriation Act. In the Budget Appropriation Act, line items for purchase of park and agricultural lands will be established for use by the Departments of Administration and Agriculture. The use of such funds for any specific capital improvement project or land acquisition is subject to approval by the Director of the Budget. No other use may be made of funds in these line items without approval by the General Assembly except for incidental expenses related to the project or land acquisition. Additionally with the approval of the Director of the Budget, either Department may request funds from the Contingency and Emergency Fund when the necessity of prompt purchase of available land can be demonstrated and funds in the capital improvement accounts are insufficient. Provided further, the net proceeds derived from the sale of any portion of the land in or around the unincorporated area known as Butner on or after July 1, 1980, shall be deposited with the State Treasurer in a capital improvement account to the credit of the Hospital to provide water and sewers and to bring those streets in the unincorporated area known as Butner not on the State highway system up to standards adequate for acceptance on the system, according to a plan adopted by the Department of Administration, and the Office of State Budget and Management, with the approval of the Board of County Commissioners of Granville County and to build industrial access roads to industries on the Butner lands. (1959, c. 683, s. 1; 1975, 2nd Sess., c. 983, s. 30; 1977, c. 771, s. 4; c. 1012; 1979, c. 608, s. 1; 1981, c. 859, s. 23.4; c. 1127, s. 33; 1981 (Reg. Sess., 1982), c. 1282, s. 24; 1983, c. 717, ss. 86, 86.1, 86.2, 87; c. 761, s. 166; 1983 (Reg. Sess., 1984), c. 1116, s. 97.)

Section Set Out Twice. — The section above is effective until July 1, 1985. For this section as amended effective July 1, 1985, see the following section, also numbered § 146-30.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added the language beginning "but if the appraised value in fee simple" at the end of the last sentence of the first paragraph.

§ 146-30. (Effective July 1, 1985) Application of net proceeds.

The net proceeds of any disposition made in accordance with this Subchapter shall be handled in accordance with the following priority: First, in accordance with the provisions of any trust or other instrument of title whereby title to such real property was heretofore acquired or is hereafter acquired; second, as provided by any other act of the General Assembly; third, the net proceeds shall be deposited with the State Treasurer. Provided, however, nothing herein shall be construed as prohibiting the disposition of any State lands by exchange for other lands, but if the appraised value in fee simple of any property involved in the exchange is at least twenty-five thousand dollars ($25,000), then such exchange may not be made without consultation with the Joint Legislative Commission on Governmental Operations.

For the purposes of this Subchapter, the term "net proceeds" means the gross amount received from the sale, lease, rental, or other disposition of any State lands, less

(1) Such expenses incurred incident to that sale, lease, rental, or other disposition as may be allowed under rules and regulations adopted by the Governor and approved by the Council of State;

§ 146-30 is set out twice. See section heading for effective dates.

(2) Amounts paid pursuant to G.S. 105-296.1, if any; and

(3) A service charge to be paid into the State Land Fund.

The amount or rate of such service charge shall be fixed by rules and regulations adopted by the Governor and approved by the Council of State, but as to any particular sale, lease, rental, or other disposition, it shall not exceed ten percent (10%) of the gross amount received from such sale, lease, rental, or other disposition. Notwithstanding any other provision of this Subchapter, the net proceeds derived from the sale of land or products of land owned by or under the supervision and control of the Wildlife Resources Commission, or acquired or purchased with funds of that Commission, shall be paid into the Wildlife Resources Fund. Provided, however, the net proceeds derived from the sale of land or timber from land owned by or under the supervision and control of the Department of Agriculture shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Agriculture, to be used for such specific capital improvement projects or other purposes as are provided by transfer of funds from those accounts in the Current Operations Appropriations Act. Provided further, the net proceeds derived from the sale of park land owned by or under the supervision and control of the Department of Natural Resources and Community Development shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Administration to be used for the purpose of park land acquisition as provided by transfer of funds from those accounts in the Current Operations Appropriations Act. In the Current Operations Appropriations Act, line items for purchase of park and agricultural lands will be established for use by the Departments of Administration and Agriculture. The use of such funds for any specific capital improvement project or land acquisition is subject to approval by the Director of the Budget. No other use may be made of funds in these line items without approval by the General Assembly except for incidental expenses related to the project or land acquisition. Additionally with the approval of the Director of the Budget, either Department may request funds from the Contingency and Emergency Fund when the necessity of prompt purchase of available land can be demonstrated and funds in the capital improvement accounts are insufficient. Provided further, the net proceeds derived from the sale of any portion of the land in or around the unincorporated area known as Butner on or after July 1, 1980, shall be deposited with the State Treasurer in a capital improvement account to the credit of the Hospital to provide water and sewers and to bring those streets in the unincorporated area known as Butner not on the State highway system up to standards adequate for acceptance on the system, according to a plan adopted by the Department of Administration, and the Office of State Budget and Management, with the approval of the Board of County Commissioners of Granville County and to build industrial access roads to industries on the Butner lands. (1959, c. 683, s. 1; 1975, 2nd Sess., c. 983, c. 30; 1977, c. 771, s. 4; c. 1012; 1979, c. 608, s. 1; 1981, c. 859, s. 23.4; c. 1127, s. 33; 1981 (Reg. Sess., 1982), c. 1282, s. 24; 1983, c. 717, ss. 86, 86.1, 86.2, 87; c. 761, s. 166; 1983 (Reg. Sess., 1984), c. 1034, s. 164; c. 1116, s. 97.)

Section Set Out Twice. — The section above is effective July 1, 1985. For this section as in effect until July 1, 1985, see the preceding section, also numbered § 146-30.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 and c. 1116, s. 115 are severability clauses.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment by c. 1034, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

The 1983 (Reg. Sess., 1984) amendment by c. 1116, effective July 1, 1984, added the language beginning "but if the appraised value in fee simple" at the end of the last sentence of the first paragraph.

§ 146-30 is set out twice. See section heading for effective dates.

ARTICLE 8.

Miscellaneous Provisions.

§ 146-32. Exemptions as to leases, etc.

The Governor, acting with the approval of the Council of State, may adopt rules and regulations.

(3) No rule or regulation adopted under this section may exempt from the provisions of G.S. 146-25.1 any class of lease or rental which has a duration of more than 21 days.

(1959, c. 683, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added subdivision (3).

SUBCHAPTER IV. MISCELLANEOUS.

ARTICLE 16.

Form of Conveyances.

§ 146-74. Approval of conveyances.

Every proposed conveyance in fee of State lands shall be submitted to the Governor and Council of State for their approval. If the proposed conveyance is of State lands with an appraised value of at least twenty-five thousand dollars ($25,000), and it is for other than a transportation purpose, the Council of State shall consult with the Joint Legislative Commission on Governmental Operations before making a final decision on the proposed conveyance. Upon approval of the proposed conveyance in fee by the Governor and Council of State, a deed for the land being conveyed shall be executed in the manner prescribed in this Article. (1957, c. 584, s. 7; G.S., s. 143-147; 1959, c. 683, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, s. 115, is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted the present second sentence.

ARTICLE 17.

Title in State.

§ 146-79. Title presumed in the State; tax titles.

CASE NOTES

The operation of this section does not effect an uncompensated taking. State v. Taylor, 63 N.C. App. 364, 304 S.E.2d 767 (1983), cert. denied and appeal dismissed, —

N.C. —, 312 S.E.2d 655 (1984).

The statutory presumption, etc. —

The State has the ultimate title to the soil. Since title to land is originally acquired from the State, it is reasonable to assume that, absent proof otherwise, title to any parcel within its boundaries reposes there. Therefore the presumption of title in the State created under this section passes constitutional muster. State v. Taylor, 63 N.C. App. 364, 304 S.E.2d 767 (1983), cert. denied and appeal dismissed — N.C. —, 312 S.E.2d 655 (1984).

Chapter 147.

State Officers.

Article 3.

The Governor.

Sec.

147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.

147-16.2. Duration of boards and councils created by executive officials; extensions.

147-33. (Effective July 1, 1985) Compensation and expenses of Lieutenant Governor.

Article 4.

Secretary of State.

147-35. (Effective July 1, 1985) Salary of Secretary of State.

Article 5A.

Auditor.

147-64.1. (Effective July 1, 1985) Salary of State Auditor.

Article 6.

Treasurer.

Sec.

147-65. (Effective July 1, 1985) Salary of State Treasurer.

147-68.1. Banking operations.

147-69.3. Administration of State Treasurer's investment programs.

Article 7.

Secretary of Revenue.

147-87. (Effective July 1, 1985) Secretary of Revenue; appointment; salary.

Article 3.

The Governor.

§ 147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.

The salary of the Governor shall be ninety-three thousand five hundred sixteen dollars ($93,516) [per annum] payable monthly. He shall be paid annually the sum of eleven thousand five hundred dollars ($11,500) as an expense allowance in attending to the business for the State and for expenses out of the State and in the State in representing the interest of the State and people, incident to the duties of his office, the said allowance to be paid monthly. In addition to the foregoing allowance, the actual expenses of the Governor while traveling outside the State on business incident to his office shall be paid by a warrant drawn on the State Treasurer. Whenever a person who is not a State official or employee is designated by the Governor to represent the Governor's office, such person shall be paid actual travel expenses incurred in the performance of such duty; provided that the payment of such travel expense shall conform to the provisions of the biennial appropriation act in effect at the time the payment is made. (1879, c. 240; Code, s. 3720; 1901, c. 8; Rev., s. 2736; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320; C.S., s. 3858; 1929, c. 276, s. 1; 1947, c. 994; 1953, c. 1, s. 1; 1961, c. 1157; 1963, c. 1178, s. 1; 1965, c. 1091, s. 1; 1971, c. 1083, s. 1; 1973, c. 600; 1977, 2nd Sess., c. 1136, s. 39; c. 1249, s. 5; 1979, 2nd Sess., c. 1137, s. 31; 1981, c. 1127, s. 7; 1983, c. 761, ss. 194, 195; c. 913, s. 45; 1983 (Reg. Sess., 1984), c. 1034, s. 217.)

Editor's Note. —

It would appear that the words "per annum" were inadvertently omitted from the first sentence when it was amended by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 217.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, rewrote the first sentence, which as amended by Session Laws 1983, c. 761, s. 194, effective July 1, 1983, read "The salary of the Governor shall be sixty thousand seven hundred sixty-eight dollars ($60,768) per annum, payable monthly," and as amended by Session Laws 1983, c. 761, s. 195 to be effective January 1, 1985, read "The salary of the Governor shall be eighty-five thousand dollars ($85,000) per annum, payable monthly."

§ 147-12. Powers and duties of Governor.

CASE NOTES

The Governor has the duty to supervise the official conduct of all executive officers. The constitutional independence of the executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

§ 147-16.2. Duration of boards and councils created by executive officials; extensions.

(a) Any executive order of the Governor that creates a board, committee, council, or commission expires two years after the effective date of the executive order, unless the Governor specifies an expiration date in the order; provided, however, that any such executive order that was in effect on July 1, 1983, expires on June 30, 1985, unless the Governor specified a different expiration date in any such order. The Governor may extend any such executive order before it expires for additional periods of up to two years by doing so in writing; copies of the writing shall be filed by the Governor with the Secretary of State and the State Legislative Library.

(b) Any other State board, committee, council, or commission created by the Governor or by any other State elective officer specified in Article III of the North Carolina Constitution expires two years after it was created; provided, however, that any such board, committee, council, or commission existing as of July 1, 1984, expires on June 30, 1985, unless it was due to expire on an earlier date. The elective officer creating any such board, committee, council, or commission may extend the board, committee, council, or commission before it expires for additional periods of up to two years by doing so in writing; copies of the writing shall be filed by the elective officer with the Secretary of State and the State Legislative Library.

(c) Any State board, committee, council, or commission created by any official in the exective branch of State government, other than by those officials specified in subsections (a) and (b), expires two years after it was created; provided, however, that any board, committee, council, or commission existing as of July 1, 1984, expires on June 30, 1985, unless it was due to expire on as earlier date. The Governor may extend any such board, committee, council, or commission before it expires for additional periods of up to two years by executive order; copies of the executive order shall be filed by the Governor with the Secretary of State and the State Legislative Library.

The words, "official in the executive branch of State government," as used in this section, do not include officials of counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivision, or local boards of education, other local public districts, units or bodies of any kind, or community colleges as defined in G.S. 115D-2(2), or private corporations created by act of the General Assembly.

(d) Any elective officer specified in subsection (b) and any other official in the executive branch of State government who creates a board, committee, council, or commission shall do so in writing and shall file copies of the writing with the Secretary of State and the State Legislative Library. (1983, c. 733, s. 1; 1983 (Reg. Sess., 1984), c. 1053.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 2, 1984, rewrote this section, which formerly related to executive orders of the Governor creating a board, committee, council, or commission.

§ 147-17. May employ counsel in cases wherein State is interested.

CASE NOTES

Applied in Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

§ 147-33. (Effective July 1, 1985) Compensation and expenses of Lieutenant Governor.

The salary of the Lieutenant Governor shall be set by the General Assembly in the Current Operations Appropriations Act. In addition to this salary, the Lieutenant Governor shall be paid an annual expense allowance in the sum of eleven thousand five hundred dollars ($11,500). (1911, c. 103; C.S., s. 3862; 1945, c. 1; 1953, c. 1, s. 1; 1963, c. 1050; 1967, c. 1170, s. 1; 1971, c. 913; 1977, c. 802, s. 42.6; 1977, 2nd Sess., c. 1136, s. 40; 1979, 2nd Sess., c. 1137, s. 32; 1983, c. 761, s. 211; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 3B.

North Carolina Housing Commission.

§ 147-33.12. Commission established.

Editor's Note. —

Session Laws 1983, c. 778, s. 3, which is noted under this section in the 1983 Cumulative Supplement, is repealed by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 132.

Article 4.

Secretary of State.

§ 147-35. (Effective July 1, 1985) Salary of Secretary of State.

The salary of the Secretary of State shall be set by the General Assembly in the Current Operations Appropriations Act. (1879, c. 240, s. 6; 1881, p. 632, res.; Code, s. 3724; Rev., s. 2741; 1907, c. 994; 1919, c. 247, s. 2; C.S., s. 3863; Ex. Sess. 1920, c. 49, s. 4; 1921, c. 11, s. 1; 1931, c. 277; 1933, c. 46; 1935, c. 304; 1941, c. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 1; 1967, c. 1130; c. 1237, s. 1; 1969, c. 1214, s. 1; 1971, c. 912, s. 1; 1973, c. 778, s. 1; 1975, 2nd Sess., c. 983, s. 14; 1977, c. 802, s. 42.7; 1983, c. 761, s. 212; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 5A.

Auditor.

§ 147-64.1. (Effective July 1, 1985) Salary of State Auditor.

(a) The salary of the State Auditor shall be set by the General Assembly in the Current Operations Appropriations Act.

[(b) This section is effective only if G.S. 147-64.1 is enacted by the General Assembly in House Bill 517, 1983 Session.] (1983, c. 761, s. 214; c. 913, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Article 6.

Treasurer.

§ 147-65. (Effective July 1, 1985) Salary of State Treasurer.

The salary of the State Treasurer shall be as established in the Current Operations Appropriations Act. (Code, s. 3723; 1891, c. 505; Rev., s. 2739; 1907, c. 830, s. 3; c. 994, s. 2; 1917, c. 161; 1919, c. 233; c. 247, s. 3; C.S., s. 3868; Ex. Sess. 1920, c. 49, s. 2; 1921, c. 11, s. 1; 1935, c. 249; 1941, c. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 1; 1967, c. 1130; c. 1237, s. 1; 1969, c. 1214, s. 1; 1971, c. 912, s. 1; 1973, c. 778, s. 1; 1975, 2nd Sess., c. 983, s. 16; 1977, c. 802, s. 42.9; 1983, c. 761, s. 215; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

§ 147-68.1. Banking operations.

The cost of administration, management, and operations of the banking operations of the Department of State Treasurer shall be apportioned equitably among the funds and programs using these services, and the costs so apportioned shall be deposited with the State Treasurer as a general fund nontax revenue. The cost of administration, management and operations of the banking operations of the Department of State Treasurer shall be covered by an appropriation to the State Treasurer for this purpose in the Current Operations Appropriations Act. (1983 (Reg. Sess., 1984), c. 1034, s. 118.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 257, makes this section effective July 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

§ 147-69.3. Administration of State Treasurer's investment programs.

(f) The cost of administration, management, and operation of investment programs established pursuant to this section shall be apportioned equitably among the programs in such manner as may be prescribed by the State Treasurer, and the costs so apportioned shall be paid from each program and deposited with the State Treasurer as a General Fund nontax revenue. The cost of administration, management, and operation of investment programs established pursuant to this section shall be covered by an appropriation to the State Treasurer for this purpose in the Current Operations Appropriations Act.

(1979, c. 467, s. 3; 1981, c. 445, ss. 4, 5; 1983, c. 515, s. 1; c. 702, s. 10; 1983 (Reg. Sess., 1984), c. 1034, ss. 116, 117.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, added "and the costs so apportioned shall be paid from each program and deposited with the State Treasurer as a General Fund nontax revenue" at the end of the first sentence of subsection (f) and added the second sentence of subsection (f).

ARTICLE 7.

Secretary of Revenue.

§ 147-87. (Effective July 1, 1985) Secretary of Revenue; appointment; salary.

A Secretary of Revenue shall be appointed by the Governor on January 1, 1933, and quadrennially thereafter. The term of office of the Secretary shall be four years and until his successor is appointed and qualified. His salary shall be fixed by the General Assembly in the Current Operations Appropriations

Act. (1921, c. 40, ss. 2, 6; 1929, c. 232; 1973, c. 476, s. 193; 1983, c. 717, s. 90; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

For this section as in effect until July 1, 1985, see the 1983 Cumulative Supplement.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1985, substituted reference to the Current Operations Appropriations Act for reference to the Budget Appropriations Act in this section.

Chapter 148.

State Prison System.

ARTICLE 3.

Labor of Prisoners.

§ 148-33.2. Restitution by prisoners with work-release privileges.

CASE NOTES

Cited in State v. Bunn, — N.C. App. —, 310 S.E.2d 792 (1984).

ARTICLE 3B.

Facilities and Programs for Youthful Offenders.

§ 148-49.10. Purposes of Article.

CASE NOTES

Applied in State v. Watson, 65 N.C. App. 411, 309 S.E.2d 2 (1983).

§ 148-49.14. Sentencing committed youthful offenders.

CASE NOTES

Section Requires Determination, etc. — This section does not say how a judge should exercise his discretion or what factors he must consider when imposing a sentence. Therefore the Appeals Court cannot hold that because a judge has a policy of not sentencing those convicted of armed robbery as committed youthful offenders that he has committed error under the statute. State v. Harris, — N.C. App. —, 312 S.E.2d 541 (1984).

Applied in State v. Ziglar, 308 N.C. 747, 304 S.E.2d 206 (1983).

§ 148-49.15. Parole of committed youthful offenders.

CASE NOTES

Applied in State v. Reid, — N.C. App. —, 311 S.E.2d 675 (1984).

Article 4.

Paroles.

§ 148-57.1. Restitution as a condition of parole.

CASE NOTES

Constitutionality. — A requirement that a defendant pay restitution as a condition of parole or work release is not inherently unconstitutional. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

The constitutionality of a reparation requirement may only be considered if and when restitution is ordered. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

The constitutionality of a reparation requirement may only be determined by considering defendant's financial status at the time when restitution may be paid. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

There is no statutory requirement for a sentencing judge to inquire into a defendant's ability to pay restitution when the judge merely recommends restitution as a condition of parole or work release. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

Parole Commission, etc., Not Bound by Recommendation of Restitution. — Neither the Parole Commission nor the Department of Correction is bound by the judge's recommendation of restitution as a condition of parole or work release. State v. Arnette, — N.C. App. —, 312 S.E.2d 547 (1984).

Article 4A.

Out-of-State Parolee Supervision.

§ 148-65.1. Governor to execute compact; form of compact.

CASE NOTES

Phrase "at all times" in subdivision (3) of this section clearly implies a right of the sending state to retake the probationer prior to a revocation hearing in the receiving state, and to hold the hearing in the sending state. State v. Coleman, 64 N.C. App. 384, 307 S.E.2d 207 (1983).

§ 148-65.1A. Interstate parole and probation hearing procedures.

CASE NOTES

Applied in State v. Coleman, 64 N.C. App. 384, 307 S.E.2d 207 (1983).

Chapter 150A.

Administrative Procedure Act.

Article 1.

General Provisions.

Sec.
150A-3 to 150A-8. [Repealed effective July 1, 1985.]

Article 2.

Rule Making.

150A-10. [Repealed.]

Article 3.

Administrative Hearings.

150A-23 to 150A-28. [Repealed effective July 1, 1985.]
150A-31 to 150A-35. [Repealed effective July 1, 1985.]

Sec.
150A-37 to 150A-42. [Repealed effective July 1, 1985.]

Article 4.

Judicial Review.

150A-44. [Repealed effective July 1, 1985.]
150A-46 to 150A-50. [Repealed effective July 1, 1985.]
150A-53 to 150A-57. [Repealed effective July 1, 1985.]

Article 5.

Publication of Administrative Rules.

150A-58 to 150A-64. [Repealed effective July 1, 1985.]

Article 1.

General Provisions.

§ 150A-1. (Repealed effective July 1, 1985) Scope and policy.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Applied in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983); House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983); Pearce v. North Carolina State Hwy. Patrol Voluntary Pledge Comm., — N.C. —, 312 S.E.2d 421 (1984).

§ 150A-2. (Repealed effective July 1, 1985) Definitions.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

Applied in Piney Mt. Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983).

§§ 150A-3 to 150A-8: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For these sections as in effect until July 1, 1985, see the bound volume.

ARTICLE 2.

Rule Making.

§ 150A-10: Repealed by Session Laws 1983, c. 641, s. 2, effective January 1, 1984.

Editor's Note. —
This section was also repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

ARTICLE 3.

Administrative Hearings.

§§ 150A-23 to 150A-28: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For these sections as in effect until July 1, 1985, see the bound volume.

§ 150A-29. (Repealed effective July 1, 1985) Rules of evidence.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

The standard of review, known as the "whole record test", presents to the trial judge a task which must be distinguished from both de novo review and the any competent evidence standard of review. Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

The whole record test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. Thus, the task before the trial court is to consider all the evidence, both that which supports the decision of the board and that which detracts from it. Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

The whole record test does not allow the reviewing court to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. On the other hand, the whole record rule requires the court, in determining the substantiality of evidence supporting the board's decision, to take into account whatever in the record fairly detracts from the weight of the board's evidence. Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the board's result, without taking into account contradictory evidence or evidence

from which conflicting inferences could be drawn. Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

§ 150A-30. (Repealed effective July 1, 1985) Official notice.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

Applied in Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

§§ 150A-31 to 150A-35: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For these sections as in effect until July 1, 1985, see the bound volume.

§ 150A-36. (Repealed effective July 1, 1985) Final agency decision.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

Applied in Piney Mt. Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983).

§§ 150A-37 to 150A-42: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For these sections as in effect until July 1, 1985, see the bound volume.

ARTICLE 4.

Judicial Review.

§ 150A-43. (Repealed effective July 1, 1985) Right to judicial review.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

Record Must Indicate Basis for Exercise of Discretion. — While it is true that the determination whether by common judgment certain conduct is disqualifying is left to the sound discretion of the board, the record must include an indication of the basis upon which the board or other agency exercised its expert discretion. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

§ 150A-44: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For this section as in effect until July 1, 1985, see the bound volume.

§ 150A-45. (Repealed effective July 1, 1985) Manner of seeking review; time for filing petition; waiver.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

§§ 150A-46 to 150A-50: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For these sections as in effect until July 1, 1985, see the bound volume and the 1983 Cumulative Supplement.

§ 150A-51. (Repealed effective July 1, 1985) Scope of review; power of court in disposing of case.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

I. IN GENERAL.

Review of Decisions of Boards of Education. — The appropriate standard of judicial review for reviewing administrative decisions of boards of education is set forth in this section. Faulkner v. New Bern-Craven County Bd. of Educ., 65 N.C. App. 483, 309 S.E.2d 548 (1983).

The applicable standard of judicial review for an appeal of a school board decision is set forth in this section. Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

Applied in Davidson v. Winston-Salem/Forsyth County Bd. of Educ., 62 N.C. App. 489, 303 S.E.2d 202 (1983); American Nat'l Ins. Co. v. Ingram, 63 N.C. App. 38, 303 S.E.2d 649 (1983); House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983); Little v. North Carolina State Bd. of Dental Exmrs., 64 N.C. App. 67, 306 S.E.2d 534 (1983).

Stated in In re DeLancy, — N.C. App. —, 313 S.E.2d 880 (1984).

II. "WHOLE RECORD" TEST.

The standard of judicial, etc. —

In accord with 1st paragraph in original. See Faulkner v. New Bern-Craven County Bd. of Educ., 65 N.C. App. 483, 309 S.E.2d 548 (1983); Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

The whole record test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. Thus, the task before the trial court is to consider all the evidence, both that which supports the decision of the board and that which detracts from it. Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

Court May Not Replace, etc. —

In accord with 1st paragraph in original. See Faulkner v. New Bern-Craven County Bd. of Educ., 65 N.C. App. 483, 309 S.E.2d 548 (1983).

The whole record test does not allow the reviewing court to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. On the other hand, the whole record rule requires the court, in determining the substantiality of evidence supporting the board's decision, to take into account whatever in the record fairly detracts from the weight of the board's evidence. Goodwin v. Goldsboro City Bd. of Educ., — N.C. App. —, 312 S.E.2d 892 (1984).

Including Contradictory, etc. —

In accord with 1st paragraph in original. See Faulkner v. New Bern-Craven County Bd. of Educ., 65 N.C. App. 483, 309 S.E.2d 548 (1983).

§ 150A-52. (Repealed effective July 1, 1985) Appeal to appellate division; obtaining stay of court's decision.

Section Repealed Effective July 1, 1985. — This section is repealed, effective July 1, 1985, by Session Laws 1983, c. 923, s. 52.

CASE NOTES

Scope of Appellate Review. — The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. That is, it must be determined whether the trial court committed any errors of law. American Nat'l Ins. Co. v. Ingram, 63 N.C. App. 38, 303 S.E.2d 649, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983).

§§ 150A-53 to 150A-57: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For these sections as in effect until July 1, 1985, see the bound volume.

ARTICLE 5.

Publication of Administrative Rules.

§§ 150A-58 to 150A-64: Repealed by Session Laws 1983, c. 923, s. 52, effective July 1, 1985.

For these sections as in effect until July 1, 1985, see the bound volume and the 1983 Cumulative Supplement.

Chapter 153A.

Counties.

Article 16.

County Service Districts.

Sec.
153A-301. Purposes for which districts may be established.

Article 1.

Definitions and Statutory Construction.

§ 153A-4. Broad construction.

CASE NOTES

Legislative Intent. — This legislative mandate requires broad construction of those statutes granting power and restrictive readings of those purporting to limit the power. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

Article 4.

Form of Government.

Part 3. Organization and Procedures of the Board of Commissioners.

§ 153A-40. Regular and special meetings.

CASE NOTES

Stated in Wright v. County of Macon, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

Article 5.

Administration.

Part 1. Organization and Reorganization of County Government.

§ 153A-76. Board of commissioners to organize county government.

OPINIONS OF ATTORNEY GENERAL

Division of County Health Department. — Although a board of commissioners may organize county government pursuant to this section, the section expressly prohibits the

board from abolishing a department, such as the county health department, and assigning elsewhere its functions and duties. Therefore, a county health department may not be divided into two or more agencies. See opinion of Attorney General to Dr. Ronald H. Levine, State Health Director, 52 N.C.A.G. 44 (1982).

§ 153A-77. Authority of boards of commissioners in certain counties over commissions, boards, agencies, etc.

OPINIONS OF ATTORNEY GENERAL

County Board of Health. — Pursuant to this section, a board of commissioners, in a county with a population in excess of 325,000, may assume all powers, responsibilities and duties of a county board of health. The board may exercise the power and authority after conducting a public hearing pursuant to 30 days' notice. Although the board may appoint advisory groups, the statute does not authorize the delegation of the former power and authority of the county board of health to another agency. See opinion of Attorney General to Dr. Ronald H. Levine, State Health Director, 52 N.C.A.G. 44 (1982).

Local Health Director. — The authority conferred by this section is limited to commissions, boards and agencies appointed by the board of commissioners or acting pursuant to its authority. The local health director is appointed by the county board of health and his authority is conferred by statute. Furthermore, the authority of the board of commissioners to assume the power and responsibilities of agencies is limited by the statute to boards, such as health and social services, and similar agencies. The office of local health director is unaffected by this section and must be filled by the board of commissioners. See opinion of Attorney General to Dr. Ronald H. Levine, State Health Director, 52 N.C.A.G. 44 (1982).

ARTICLE 6.

Delegation and Exercise of the General Police Power.

§ 153A-121. General ordinance-making power.

CASE NOTES

Authority for County Ordinance Concerning Collection and Disposal of Solid Waste. — County governments are delegated by the state with a general police power. Additionally, counties are specifically vested by statute with authority to regulate by ordinance the collection and disposal of solid waste within their jurisdictions. In order to effect this regulatory power and meet their police power responsibilities, counties are specifically authorized by statute to enact ordinances granting exclusive franchises to commercially collect or dispose of solid waste within all or a defined portion of the county. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

§ 153A-122. Territorial jurisdiction of county ordinances.

CASE NOTES

This section provides for mutual exclusivity of territorial jurisdiction between city and county governments. This mutual exclusivity has been recognized by the courts as manifestly necessary to avoid confusion and disastrous conflicts of jurisdiction and authority. However, these considerations of governmental efficiency do not apply as strongly to private vested rights granted by county governments. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

§ 153A-136. Regulation of solid wastes.

CASE NOTES

Authority of County Ordinance Concerning Collection and Disposal of Solid Waste. — County governments are delegated by the state with a general police power. Additionally, counties are specifically vested by statute with authority to regulate by ordinance the collection and disposal of solid waste within their jurisdictions. In order to effect this regulatory power and meet their police power responsibilities, counties are specifically authorized by statute to enact ordinances granting exclusive franchises to commercially collect or dispose of solid waste within all or a defined portion of the county. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

§ 153A-140. Abatement of public health nuisances.

Editor's Note. — The reference in the next-to-last sentence of this section to § 106A-174 should be to § 160A-174.

ARTICLE 8.

County Property.

Part 3. Disposition of County Property.

§ 153A-176. Disposition of property.

Local Modification. — Lincoln: 1983 (Reg. Sess., 1984), c. 944.

ARTICLE 16.

County Service Districts.

§ 153A-301. Purposes for which districts may be established.

The board of commissioners of any county may define any number of service districts in order to finance, provide, or maintain for the districts one or more of the following services, facilities and functions in addition to or to a greater extent than those financed, provided or maintained for the entire county:

(8) Watershed improvement projects, including but not limited to watershed improvement projects as defined in General Statutes Chapter 139; drainage projects, including but not limited to the drainage projects provided for by General Statutes Chapter 156; and water resources development projects, including but not limited to the federal water resources development projects provided for by General Statutes Chapter 143, Article 21;

(9) Cemeteries. (1973, c. 489, s. 1; c. 822, s. 2; c. 1375; 1979, c. 595, s. 1; c. 619, s. 6; 1983 (Reg. Sess., 1984), c. 1078, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 3, 1984, substituted a semicolon for a comma at the end of subdivision (8) and added subdivision (9).

Article 18.

Planning and Regulation of Development.

Part 4. Building Inspection.

§ 153A-351. Inspection department; certification of electrical inspectors.

Editor's Note. —

Session Laws 1977, c. 531, s. 7, which is noted under this section in the Replacement Volume, was repealed by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 124.

§ 153A-351.1. Qualifications of inspectors.

Editor's Note. —

Session Laws 1977, c. 531, s. 7, which is noted under this section in the Replacement Volume, was repealed by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 124.

Chapter 156.

Drainage.

SUBCHAPTER III. DRAINAGE DISTRICTS.

ARTICLE 6.

Drainage Commissioners.

§ 156-81. Election and organization under amended act.

CASE NOTES

Constitutionality. —
In accord with original. See White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

Chapter 157.

Housing Authorities and Projects.

Article 5

State Indian Housing Authority.

Sec.
157-70. Rentals and tenant selection in accordance with § 157-29.

Article 1.

Housing Authorities Law.

§ 157-13. Zoning and building laws.

CASE NOTES

A town council may not violate at will the regulations it has established for its own procedure; it must comply with the provisions of the applicable ordinance. This requirement is necessary in order to accord due process and equal protection to applicants and to refute charges that any denial is an arbitrary discrimination against the property owner. Piney Mt. Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983).

Article 5.

State Indian Housing Authority.

§ 157-70. Rentals and tenant selection in accordance with § 157-29.

Rentals and tenant selection in connection with projects of the Authority shall be in accordance with G.S. 157-29. (1977, c. 1112, s. 5; 1983 (Reg. Sess., 1984), c. 1068.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 2, 1984, deleted "except that tenants in such projects shall be Indians" at the end of this section.

Chapter 158.

Local Development.

Article 1.

Local Development Act of 1925.

Sec.

158-1. [Repealed.]
158-2. [Repealed.]

Article 1.

Local Development Act of 1925.

§ 158-1: Repealed by Session Laws 1973, c. 803, s. 37.

Cross References. — See now §§ 158-7.1, 158-7.2.

Editor's Note. — The above repeal line has been set out at the direction of the Revisor of Statutes.

§ 158-2: Repealed by Session Laws 1973, c. 803, s. 38.

Cross References. — See now §§ 158-7.1, 158-7.2.

Editor's Note. — The above repeal line has been set out at the direction of the Revisor of Statutes.

Chapter 159.

Local Government Finance.

SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

Article 3.

The Local Government Budget and Fiscal Control Act.

Part 1. Budgets.

Sec.
159-7. Short title; definitions; local acts superseded.
159-17.1. Vending facilities.

SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

ARTICLE 3.

The Local Government Budget and Fiscal Control Act.

Part 1. Budgets.

§ 159-7. Short title; definitions; local acts superseded.

(b) The words and phrases defined in this section have the meanings indicated when used in this Article, unless the context clearly requires another meaning.

(1) "Budget" is a proposed plan for raising and spending money for specified programs, functions, activities or objectives during a fiscal year.

(2) "Budget ordinance" is the ordinance that levies taxes and appropriates revenues for specified purposes, functions, activities, or objectives during a fiscal year.

(3) "Budget year" is the fiscal year for which a budget is proposed or a budget ordinance is adopted.

(4) "Debt service" is the sum of money required to pay installments of principal and interest on bonds, notes, and other evidences of debt accruing within a fiscal year, and to maintain sinking funds.

(5), (6) Repealed by Session Laws 1975, c. 514, s. 2.

(7) "Fiscal year" is the annual period for the compilation of fiscal operations, as prescribed in G.S. 159-8(b).

(8) "Fund" is a fiscal and accounting entity with a self-balancing set of accounts recording cash and other resources, together with all related liabilities and residual equities or balances, and changes therein, for the purpose of carrying on specific activities or attaining certain objectives in accordance with special regulations, restrictions, or limitations.

(9) Repealed by Session Laws 1975, c. 514, s. 2.

(10) "Public authority" is a municipal corporation (other than a unit of local government) that is not subject to the Executive Budget Act (G.S. 143-1 through 143-34.5) or a local governmental authority, board, commission, council, or agency that (i) is not a municipal corporation, (ii) is not subject to the Executive Budget Act, and (iii) operates on an area, regional, or multi-unit basis, and the budgeting and accounting

systems of which are not fully a part of the budgeting and accounting systems of a unit of local government.

(11) Repealed by Session Laws 1975, c. 514, s. 2.

(12) "Sinking fund" means a fund held for the retirement of term bonds.

(13) "Special district" is a unit of local government (other than a county city, town, or incorporated village) that is created for the performance of limited governmental functions or for the operation of a particular utility or public service enterprises.

(14) "Taxes" do not include special assessments.

(15) "Unit," "unit of local government," or "local government" is a municipal corporation that is not subject to the Executive Budget Act (G.S. 143-1 through 143-34.5) and that has the power to levy taxes, and all boards, agencies, commissions, authorities, and institutions thereof that are not municipal corporations.

(16) "Vending facilities" has the same meaning as it does in G.S. 143-12.1.

(1927, c. 146, ss. 1, 2; 1955, c. 724; 1971, c. 780, s. 1; 1973, c. 474, ss. 3, 4; 1975, c. 437, s. 12; c. 514, s. 2; 1981, c. 685, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 173.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective Oct. 1, 1984, added subdivision (b)(16).

§ 159-17.1. Vending facilities.

Moneys received by a public authority, special district, or unit of local government on account of operation of vending facilities shall be deposited, budgeted, appropriated, and expended in accordance with the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 174.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 175, makes this section effective Oct. 1, 1984.

Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 256 is a severability clause.

SUBCHAPTER IV. LONG-TERM FINANCING.

ARTICLE 4.

Local Government Bond Act.

Part 2. Procedure for Issuing Bonds.

§ 159-51. Application to Commission for approval of bond issue; preliminary conference; acceptance of application.

CASE NOTES

Cited in Wright v. County of Macon, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

§ 159-55. Sworn statement of debt; debt limitation.

CASE NOTES

Applied in Wright v. County of Macon, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

§ 159-57. Hearing; passage of bond order.

CASE NOTES

Stated in Wright v. County of Macon, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

§ 159-59. Limitation of action to set aside order.

CASE NOTES

Cited in Wright v. County of Macon, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

Chapter 159B.

Joint Municipal Electric Power and Energy Act.

Article 2.

Joint Agencies; Municipalities.

Sec.
159B-27. Taxes; payments in lieu of taxes.

ARTICLE 2.

Joint Agencies; Municipalities.

§ 159B-27. Taxes; payments in lieu of taxes.

(b) Each municipality having an ownership share in a project shall pay to the State in lieu of an annual franchise or privilege tax an amount equal to three and twenty-two hundredths percent (3.22%) of that percentage of all moneys expended by said municipality on account of its ownership share, including payment of principal and interest on bonds issued to finance such ownership share, which is equal to the percentage of such city or town's total entitlement that is used or sold by it to any person, firm or corporation exempted by law from the payment of the tax on gross receipts pursuant to G.S. 105-116.

(c) In lieu of an annual franchise or privilege tax, each joint agency shall pay to the State an amount equal to three and twenty-two hundredths percent (3.22%) of the gross receipts from sales of electric power or energy, less receipts from sales of electric power or energy to a vendee subject to tax under G.S. 105-116.

(d) The State shall distribute to cities and towns which receive electric power and energy from their ownership share of a project or to which electric power and energy is sold by a joint agency an amount equal to a tax of three and nine hundredths percent (3.09%) of all moneys expended by a municipality on account of its ownership share of a project, including payment of principal and interest on bonds issued to finance such ownership share, or an amount equal to a tax of three and nine hundredths percent (3.09%) of the gross receipts from all sales of electric power and energy to such city or town by a joint agency, as the case may be.

(1973, c. 476, s. 193; 1975, c. 186, s. 1; 1977, c. 385, s. 12; 1981, c. 487; 1983, c. 574, s. 10; 1983 (Reg. Sess., 1984), c. 1097, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective January 1, 1985, and applicable to gross receipts earned from services and commodities provided on or after that date and to sales of electricity, piped natural gas, or telephone service on or after that date, substituted "three and twenty-two hundredths percent (3.22%)" for "six percent (6%)" near the beginning of subsection (b), rewrote subsection (c), and in subsection (d) substituted "three and nine hundredths percent (3.09%)" for "three percent (3%)" in two places.

Chapter 160A.

Cities and Towns.

Article 19.

Planning and Regulation of Development.

Part 2. Subdivision Regulation.

Sec.

160A-374. Effect of plat approval on dedications.

Article 1.

Definitions and Statutory Construction.

§ 160A-1. Application and meaning of terms.

CASE NOTES

Constitutionality. — See In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380, cert. denied and appeal dismissed, 309 N.C. 820, 310 S.E.2d 351 (1983).

Article 4A.

Extension of Corporate Limits.

Part 1. Extension by Petition.

§ 160A-29. Map of annexed area, copy of ordinance and election results recorded in the office of register of deeds.

CASE NOTES

As to constitutionality of Article, see Forsyth Citizens Opposing Annexation v. City of Winston-Salem, — N.C. App. —, 312 S.E.2d 517 (1984).

Part 2. Annexation by Cities of Less than 5,000.

§ 160A-33. Declaration of policy.

CASE NOTES

Application to Property of Condominium Owners. — Condominium unit owners need municipal services like water, sewage disposal, and police and fire protection just as do homeowners in any new development. It would lead to anomalous results and violate legislative intent to construe the statute as applying to the property of homeowners but not to the property of condominium unit owners. Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 296 (1984).

Prior Jurisdiction Doctrine. — Adherence to the prior jurisdiction doctrine is not only consistent with the majority rule, but is in keeping with the spirit and intent of the annexation statutes. City of Burlington v. Town of Elon College, — N.C. —, 314 S.E.2d 534 (1984).

Where one municipality institutes valid annexation proceedings first, that municipality should be given priority under the prior jurisdiction rule, and subsequent annexation proceedings, of whatever nature, are of no force and effect. City of Burlington v. Town of Elon College, — N.C. —, 314 S.E.2d 534 (1984).

Preference of Landowners Is of No Consequence. — For purposes of the prior jurisdiction rule, annexation proceedings, regardless of their nature, are "equivalent proceedings," and it is of no consequence which town or city the landowners prefer. In fact, it appears to be the very essence of the involuntary annexation procedures that the affected landowners have no choice, as long as the annexing body complies with the applicable statutes. City of Burlington v. Town of Elon College, — N.C. —, 314 S.E.2d 534 (1984).

§ 160A-36. Character of area to be annexed.

CASE NOTES

For discussion as to history and scope of subsection (c), see Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 296 (1984).

The word "lot" in subsection (c) includes the concept of a condominium unit. Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 296 (1984).

§ 160A-42. Land estimates.

CASE NOTES

Applied in Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983).

Part 3. Annexation by Cities of 5,000 or More.

§ 160A-45. Declaration of policy.

CASE NOTES

Legislative Intent. —

To apply strictly interpretation to §§ 160A-45 to 160A-56 would contravene the intent of the legislature, which is to obtain a meaningful review of annexation ordinances. Southern Glove Mfg. Co. v. City of Newton, 63 N.C. App. 754, 306 S.E.2d 466 (1983).

The central purpose behind the annexation procedure is to assure that, in return for the added financial burden of municipal taxation, the residents of the annexed area receive the benefits of all the major services available to municipal residents. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

The minimum requirements of the annexation statute are that the city provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

It is not required that proposed sewer interceptors be included on the maps that accompany annexation reports. Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983).

The legislature has recognized the importance of adequate water and sewer facilities to the end of quality urban development and specifically required that certain present and proposed water and sewer facilities be shown in the report. That the legislature did not include

proposed sewer interceptors among those certain facilities is a matter of legislative concern. Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983).

Prior Jurisdiction Doctrine. — Adherence to the prior jurisdiction doctrine is not only consistent with the majority rule, but is in keeping with the spirit and intent of the annexation statutes. City of Burlington v. Town of Elon College, — N.C. —, 314 S.E.2d 534 (1984).

Where one municipality institutes valid annexation proceedings first, that municipality should be given priority under the prior jurisdiction rule, and subsequent annexation proceedings, of whatever nature, are of no force and effect. City of Burlington v. Town of Elon College, — N.C. —, 314 S.E.2d 534 (1984).

Preference of Landowners Is of No Consequence. — For purposes of the prior jurisdiction rule, annexation proceedings, regardless of their nature, are "equivalent proceedings," and it is of no consequence which town or city the landowners prefer. In fact, it appears to be the very essence of the involuntary annexation procedures that the affected landowners have no choice, as long as the annexing body complies with the applicable statutes. City of Burlington v. Town of Elon College, — N.C. —, 314 S.E.2d 534 (1984).

Applied in In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380 (1983).

§ 160A-47. Prerequisites to annexation; ability to serve; report and plans.

CASE NOTES

Central purpose behind, etc. —

In accord with 1983 Cum. Supp. See Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983); In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

This Article requires that services, etc. —

The city is required by law to provide waste disposal services on substantially the same basis and in the same manner as such services are provided within the municipality prior to annexation. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

Nowhere in this section does the concept of equality with "average service" appear in reference to the municipal services to be supplied by the annexing municipality. No reasonable reading of the statutory language permits that inference. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

Subdivision (3)(a) of this section requires that the annexation report reflect the city's plans to provide certain enumerated services on substantially the same basis and in the same manner as in the rest of the city. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

The minimum requirements, etc. —

In accord with original. See Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983).

The minimum requirements of the annexation statute are that the city provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

But Plans for Other Services, etc. —

The legislative intent expressed in subdivision (3) requires extension of a variety of municipal services, all of which are required for the public health and safety. Public transportation and parks and recreational facilities do not fall within this classification of service. In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380, cert. denied and appeal dismissed, 309 N.C. 820, 310 S.E.2d 351 (1983).

There are many variables that affect the level of fire protection afforded to different areas of a municipality: height and size of buildings, construction materials, proximity of buildings to one another and street pattern, among others. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

Response time is only one of many factors that enters into the court's consideration of whether an annexation report reflects plans to provide certain required municipal services on substantially the same basis and in the same manner as in the pre-annexation city area. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

It is not required that proposed sewer interceptors be included on the maps that accompany annexation reports. Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983).

The legislature has recognized the importance of adequate water and sewer facilities to the end of the quality urban development and

specifically required that certain present and proposed water and sewer facilities be shown in the report. That the legislature did not include proposed sewer interceptors among those certain facilities is a matter of legislative concern. Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983).

Cited in Forsyth Citizens Opposing Annexation v. City of Winston-Salem, — N.C. App. —, 312 S.E.2d 517 (1984); Livingston v. City of Charlotte, — N.C. App. —, 314 S.E.2d 303 (1984).

§ 160A-48. Character of area to be annexed.

CASE NOTES

Constitutionality. — See In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

Tests as to Urban, etc. —

Not only must the entire annexation area meet the requirements of subdivision (c)(1) of this section, but even more importantly, the tests to determine whether an area is developed for urban purposes must be applied to the annexation area as a whole. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

Applied in Garland v. City of Asheville, 63 N.C. App. 490, 305 S.E.2d 66 (1983); Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983); Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir. 1983).

Stated in Livingston v. City of Charlotte, — N.C. App. —, 314 S.E.2d 303 (1984).

Cited in Forsyth Citizens Opposing Annexation v. City of Winston-Salem, — N.C. App. —, 312 S.E.2d 517 (1984).

§ 160A-49. Procedure for annexation.

Legal Periodicals. —

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Applied in In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380 (1983); Garland v. City of Asheville, 63 N.C. App. 490, 305 S.E.2d 66 (1983).

Cited in In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984); Forsyth Citizens Opposing Annexation v. City of Winston-Salem, — N.C. App. —, 312 S.E.2d 517 (1984).

§ 160A-50. Appeal.

Legal Periodicals. —

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

The central purpose behind the annexation procedure is to assure that, in return for the added financial burden of municipal taxation, the residents of the annexed area receive the benefits of all the major services available to municipal residents. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

The minimum requirements of the annexation statute are that the city provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

Limited Scope, etc. —

The clear intent of the Legislature under this section was to provide an expedited judicial review, limited in scope, and avoiding unnecessary procedural delays. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

A separate test of the reasonableness of an annexation is not included within the limited scope of judicial review; however, subsection (f) of this section and the provisions incorporated therein amount to a requirement that the courts determine whether an annexation is reasonable. Forsyth Citizens Opposing Annexation v. City of Winston-Salem, — N.C. App. —, 312 S.E.2d 517 (1984).

A court's review of an annexation ordinance is limited to the following inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will the petitioners "suffer material injury" by reason of the municipality's failure to comply? (3) Does the character of the area specified for annexation meet the requirement of § 160A-48 as applied to petitioners' property? In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380, cert. denied and appeal dismissed, 309 N.C. 820, 310 S.E.2d 351 (1983).

Record Must Show Prima, etc. —

Where the record of the annexation proceedings demonstrates prima facie substantial compliance with the applicable statutes, the burden is on the petitioner to show by competent evidence that the city has failed to meet the statutory requirements or that there was some irregularity in the proceedings that resulted in material prejudice to petitioners' rights. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

The basic question presented by a petition for review under this section is whether the procedure followed in adopting the ordinance was in substantial compliance with the applicable statutes. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984); Forsyth Citizens Opposing Annexation v. City of Winston-Salem, — N.C. App. —, 312 S.E.2d 517 (1984).

This section does not explicitly empower a superior court judge to remand an annexation ordinance upon a city's motion to exclude a landowner who originally was covered by it. Southern Glove Mfg. Co. v. City of Newton, 63 N.C. App. 754, 306 S.E.2d 466 (1983).

§ 160A-53. Definitions.

CASE NOTES

Stated in Livingston v. City of Charlotte, — N.C. App. —, 314 S.E.2d 303 (1984).

§ 160A-54. Population and land estimates.

CASE NOTES

Census figures are more reliable than any formula that alters the figures by arbitrarily assuming vacancy rates and adjusting for dwelling unit size. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

This section contains no requirement regarding the use of final census data and there is no judicially imposed requirement. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

Although this statute specifies the use of federal census data, it does not require the use of final rather than preliminary census data. In re City of Durham Annexation Ordinance No. 5791, — N.C. App. —, 311 S.E.2d 898 (1984).

ARTICLE 5.

Form of Government.

Part 1. General Provisions.

§ 160A-63. Vacancies.

Local Modification. — City of Lumberton: 1983 (Reg. Sess., 1984), c. 1009.

ARTICLE 8.

Delegation and Exercise of the General Police Power.

§ 160A-174. General ordinance-making power.

CASE NOTES

III. OTHER SPECIFIC ORDINANCES.

Waste disposal is a recognized function of local government and a service consistent with governmental responsibility under the State's delegation of police power. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

§ 160A-192. Regulation of trash and garbage.

CASE NOTES

The city is required by law to provide waste disposal services on substantially the same basis and in the same manner as such services are provided within the municipality prior to annexation. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

ARTICLE 9.

Taxation.

§ 160A-209. Property taxes.

Local Modification. — Town of Walkertown: 1983 (Reg. Sess., 1984), c. 936.

ARTICLE 10.

Special Assessments.

§ 160A-216. Authority to make special assessments.

Local Modification. — (As to Art. 10) City of Washington: 1983 (Reg. Sess., 1984), c. 951.

ARTICLE 12.

Sale and Disposition of Property.

§ 160A-265. Use and disposal of property.

Local Modification. — (As to Art. 12) Cumberland: 1983 (Reg. Sess., 1984), c. 1079; Jones: 1983 (Reg. Sess., 1984), c. 960; Pitt: 1983 (Reg. Sess., 1984), c. 942; City of Lumberton: 1983 (Reg. Sess., 1984), c. 996; City of Washington: 1983 (Reg. Sess., 1984), c. 941.

CASE NOTES

Applied in Watts v. Town of Valdese, 65 N.C. App. 822, 310 S.E.2d 152 (1984).

§ 160A-266. Methods of sale; limitation.

Local Modification. — Cherokee County: 1983 (Reg. Sess., 1984), c. 939.

§ 160A-272. Lease or rental of property.

Local Modification. — Lincoln: 1983 (Reg. Sess., 1984), c. 944; City of Statesville: 1983 (Reg. Sess., 1984), c. 940.

CASE NOTES

A municipal corporation has a twofold character and dual powers. The one is variously designated as public, governmental, political or legislative, in which the municipal corporation acts as an agency of the State. The other is variously designated as municipal, private, quasi-private, or proprietary. Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752, modified on other grounds, 309 N.C. 818, 310 S.E.2d 310 (1983).

This section empowers a city to lease or rent any property owned by the city for such terms and upon such conditions as the council may determine. This power is to be exercised by the governing body of the municipality acting in its proprietary, rather than its governmental capacity. Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752, modified on other grounds, 309 N.C. 818, 310 S.E.2d 310 (1983).

The city's proprietary or corporate power to contract for the leasing of its property is limited. It cannot be exercised so as to disadvantageously affect the governing body's governmental powers. The true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired. Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752, modified on other grounds, 309 N.C. 818, 310 S.E.2d 310 (1983).

ARTICLE 16.

Public Enterprises.

Part 1. General Provisions.

§ 160A-312. Authority to operate public enterprises.

CASE NOTES

II. EXTENSION OF SERVICES OUTSIDE CORPORATE LIMITS.

The term "reasonable limitations." — In accord with original. See Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

This section provides the sole authority for and restriction upon municipalities furnishing electric service outside corporate limits. State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

This section vests municipalities with a right to serve potential new customers outside its corporate limits so long as this extension of service is within reasonable limitations. State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

Operation of Electric System Outside Municipality. — The 1965 Electric Act, appearing in §§ 160A-331 through 160A-338 and § 62-110.2, does not empower or authorize municipalities to operate electric systems outside corporate limits, nor does it restrict such service. Insofar as the General Statutes are concerned, the sole authority for, and the only restriction upon municipalities furnishing electric service outside corporate limits is found in this section. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

§ 160A-314. Authority to fix and enforce rates.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

Part 2. Electric Service in Urban Areas.

§ 160A-331. Definitions.

CASE NOTES

The furnishing of electric service to an area subsequently annexed must be carried out pursuant to the 1965 Electric Act (§§ 160A-331 to 160A-338 and 62-110.1 to 62-110.2). State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

Operation of Electric System Outside Municipality. — The 1965 Electric Act, appearing in §§ 160A-331 through 160A-338 and § 62-110.2, does not empower or authorize municipalities to operate electric systems outside corporate limits, nor does it restrict such service. Insofar as the General Statutes are concerned, the sole authority for, and the only restriction upon municipalities furnishing electric service outside corporate limits is found in § 160A-312. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

Nothing in this Part empowers or restricts municipalities in the operation of their electric systems outside their corporate limits. State ex rel. Utilities Comm'n v. VEPCO, — N.C. —, 311 S.E.2d 586 (1984).

Article 19.

Planning and Regulation of Development.

Part 1. General Provisions.

§ 160A-360. Territorial jurisdiction.

Local Modification. — Town of Huntersville: 1983 (Reg. Sess., 1984), c. 966.

Part 2. Subdivision Regulation.

§ 160A-374. Effect of plat approval on dedications.

The approval of a plat shall not be deemed to constitute or effect the acceptance by the city or public of the dedication of any street or other ground, public utility line, or other public facility shown on the plat. However, any city council may by resolution accept any dedication made to the public of lands or facilities for streets, parks, public utility lines, or other public purposes, when the lands or facilities are located within its subdivision-regulation jurisdiction. Acceptance of dedication of lands or facilities located within the subdivision-regulation jurisdiction but outside the corporate limits of a city shall not place on the city any duty to open, operate, repair, or maintain any street, utility line, or other land or facility, and a city shall in no event be held to answer in any civil action or proceeding for failure to open, repair, or maintain any street located outside its corporate limits. Unless the city shall have agreed to begin operation and maintenance of the water system or water system facilities within one year of the time of issuance of a certificate of occupancy for the first unit of housing in the subdivision, a city shall not, as part of its subdivision regulation applied to facilities or land outside the corporate limits of the city, require dedication of water systems or facilities as a condition for subdivision approval. (1955, c. 1334, s. 1; 1971, c. 698, s. 1; 1983 (Reg. Sess., 1984), c. 1080.)

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective October 1, 1984, added the last sentence.

Part 3. Zoning.

§ 160A-381. Grant of power.

Legal Periodicals. —
For comment discussing aesthetic zoning in North Carolina in light of State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982), see 61 N.C.L. Rev. 942 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Redevelopment Comm'n v. Ford, — N.C. App. —, 313 S.E.2d 211 (1984).

V. CONDITIONAL OR SPECIAL USE PERMITS.

Safeguards against arbitrary, etc. — In passing upon an application for a special permit, a town council may not violate at will the regulations it has established for its own procedure; it must comply with the provisions of the applicable ordinance. This requirement is necessary in order to accord due process and equal protection to applicants and to refute charges that any denial is an arbitrary discrimination against the property owner. Piney Mt. Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983).

When a town council conducts a quasi-judicial hearing to determine facts prerequisite to issuance of a permit, it can dispense with no essential element of a fair trial. The applicant must have the opportunity to give evidence, cross-examine witnesses, and inspect documents; and unsworn statements may not be used to support findings absent waiver or stipulation. In allowing or denying the application, the council must state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision. Piney Mt. Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983).

VI. BUILDING PERMITS.

An ordinance which classifies mobile homes differently from modular and site-built homes is valid. The protection of property values in the zoned area is a legitimate governmental objective, and the method of construction of homes may be determined by a city governing board as affecting the price of homes. The prohibition of such buildings is rationally related to the protection of the value of other homes in the area. Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 306 S.E.2d 186, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983).

A town is clearly authorized by this section to regulate and restrict the location and use of any buildings or structures for residential and other purposes, including restricting the location of mobile homes. Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 306 S.E.2d 186, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983).

§ 160A-385. Changes.

Local Modification. — City of Charlotte: 1983 (Reg. Sess., 1984), c. 955.

§ 160A-388. Board of adjustment.

CASE NOTES

I. IN GENERAL.

Applied in Martin Marietta Corp. v. Forsyth County Zoning Bd. of Adjustment, 65 N.C. App. 316, 309 S.E.2d 523 (1983).

§ 160A-390. Conflict with other laws.

CASE NOTES

Applied in Redevelopment Comm'n v. Ford, — N.C. App. —, 313 S.E.2d 211 (1984).

Part 3A. Historic Districts.

§ 160A-395. Exercise of powers under this Part by counties as well as cities; designation of historic districts.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

Part 3B. Historic Properties Commissions.

§ 160A-399.1. Legislative findings.

Legal Periodicals. —
For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

Part 5. Building Inspection.

§ 160A-411.1. Qualifications of inspectors.

Editor's Note. —
Session Laws 1977, c. 531, s. 7, which is noted under this section in the Replacement Volume, was repealed by Session Laws 1983 (Reg. Sess., 1984), c. 1034, s. 124.

Article 20.

Interlocal Cooperation.

Part 1. Joint Exercise of Powers.

§ 160A-460. Definitions.

CASE NOTES

Applied in Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983).

§ 160A-461. Interlocal cooperation authorized.

CASE NOTES

Applied in Trask v. City of Wilmington, 64 N.C. App. 17, 306 S.E.2d 832 (1983).

Article 21.

Miscellaneous.

§ 160A-485. Waiver of immunity through insurance purchase.

CASE NOTES

Waiver of Immunity, etc. —
A city waives its immunity from civil liability in tort by purchasing liability insurance. However, immunity is waived only to the extent that the city is indemnified by the insurance contract. Gordon v. Hartford Accident & Indem. Co., 576 F. Supp. 203 (W.D.N.C. 1983).

Article 22.

Urban Redevelopment Law.

§ 160A-500. Short title.

CASE NOTES

Applied in Redevelopment Comm'n v. Ford, — N.C. App. —, 313 S.E.2d 211 (1984).

§ 160A-503. Definitions.

CASE NOTES

Cited in Housing Auth. v. Clinard, — N.C. App. —, 312 S.E.2d 524 (1984).

§ 160A-511. Interest of members or employees.

Local Modification. — City of Charlotte: 1983 (Reg. Sess., 1984), c. 964.

§ 160A-512. Powers of commission.

CASE NOTES

Applied in Redevelopment Comm'n v. Ford, — N.C. App. —, 313 S.E.2d 211 (1984).

§ 160A-514. Required procedures for contracts, purchases and sales; powers of commission in carrying out redevelopment project.

Local Modification. — City of Goldsboro: 1983 (Reg. Sess., 1984), c. 947.

CASE NOTES

Applied in Redevelopment Comm'n v. Ford, — N.C. App. —, 313 S.E.2d 211 (1984).

Chapter 162.

Sheriff.

ARTICLE 3.

Duties of Sheriff.

§ 162-14. Duty to execute process.

CASE NOTES

I. IN GENERAL.

The penalty is given to the party aggrieved chiefly as a punishment to the officer, and to stimulate him to active obedience. Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130, cert. granted, 309 N.C. 822, 310 S.E.2d 352 (1983).

The courts have no "dispensing power," etc. —

In accord with original. See Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130, cert. granted, 309 N.C. 822, 310 S.E.2d 352 (1983).

This section imposes, etc. —

In accord with original. See Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130, cert. granted, 309 N.C. 822, 310 S.E.2d 352 (1983).

Applied in Red House Furn. Co. v. Smith, — N.C. —, 313 S.E.2d 569 (1984).

II. FAILURE TO MAKE DUE RETURN.

The sheriff must be diligent, etc. —

In accord with original. See Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130, cert. granted, 309 N.C. 822, 310 S.E.2d 352 (1983).

Officer Held Liable, etc. —

The sheriff was liable for the penalty where the debtor told the deputy attempting to execute the writ that she did not owe much and that she would work it out with the creditor and refused to surrender the goods, since the deputy then declined to forcibly enter debtor's house and the deputy was not shown to have been in danger of imminent harm. Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130, cert. granted, 309 N.C. 822, 310 S.E.2d 352 (1983).

Chapter 163.

Elections and Election Laws.

SUBCHAPTER III. QUALIFYING TO VOTE.

Article 7.

Registration of Voters.

Sec.
163-72.3. Change of address on election day; authorization to vote.

SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS.

Article 22A.

Regulating Contributions and Expenditures in Political Campaigns.

Part 1. In General.

Sec.
163-278.6. Definitions.

SUBCHAPTER III. QUALIFYING TO VOTE.

ARTICLE 6.

Qualifications of Voters.

§ 163-55. Qualifications to vote; exclusion from electoral franchise.

CASE NOTES

Cited in Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983).

ARTICLE 7.

Registration of Voters.

§ 163-72.3. Change of address on election day; authorization to vote.

(a) A registered voter who has moved from one precinct to another within the same county more than 30 days before a primary or election, but who has not submitted a change of address report as provided in G.S. 163-72.2, nevertheless may vote under the following procedure:

(1) On the day of the primary or election the voter must go to the polling place for the precinct at which the voter is registered. If the precinct at which the voter is registered is not open for that election, the voter shall go instead to the county board of elections office or to another location designated by the board, at which place a board employee or election official designated by the board shall issue the certificate of removal and perform the other duties specified below for the precinct officials.

(2) Upon determining that the voter is registered in that precinct but moved more than 30 days before, the precinct registrar or a judge shall issue to the voter a certificate of removal on the following form:

"NOTICE OF ELECTION DAY TRANSFER

(name of voter as it appears in registration records)

On this day . . . . . ,

(address on voter's record)

recorded as residing at . . . . . , appeared before the undersigned precinct official. This person has not voted this date in this precinct and hereby requests that he or she be permitted to vote after executing the required transfer certificate.

. . . . . .

Registrar or Judge

. . . . . .

Name and number of precinct

. . . . . .

Signature of voter

TAKE THIS CERTIFICATE TO THE COUNTY BOARD OF ELECTIONS".

(3) Upon issuance of the certificate to the voter, the precinct official shall mark the voter's registration record with a "T" in the appropriate voting square to indicate that the voter has transferred.

(4) The voter shall take the certificate of removal to the precinct transfer assistant at the county board of elections' office. Upon determining that the voter moved more than 30 days before the election, that the voter now resides in another precinct within the county, and that the voter is otherwise qualified to vote in the election, the precinct transfer assistant shall have the voter complete the proper precinct transfer forms. The precinct transfer assistant shall then provide the voter with the proper ballots for the precinct where the voter now resides. If the voter fails to take the certificate of removal to the precinct transfer assistant at the county board of elections' office by the time the polls close on election day, the voter may at a later date submit a change of address report under G.S. 163-72.2 to become effective as provided by law.

(5) After marking the ballots in a booth or separate room provided for that purpose, the voter shall place the ballots in an envelope provided by the precinct transfer assistant. That envelope shall have printed or stamped on it the following:

Transfer voter ballot # _____

Assigned precinct _____

The precinct transfer assistant shall write the proper information in the blanks before giving the envelope to the voter.

(6) The precinct transfer assistant shall enter in a book provided by the board of elections the name of each voter permitted to vote under this section, the number assigned to the voter's ballot and envelope, the precinct in which the voter was previously registered, and the precinct to which the voter has transferred.

(7) Envelopes containing ballots voted under this section shall be retained to be opened and the ballots counted after the polls close on election day. Ballots voted at the board office shall be counted by board members or assistants appointed by the board. Ballots voted at other locations shall be counted by the precinct transfer assistants assigned to those locations, aided by precinct officials or ballot counters for those locations. At each location all envelopes shall be opened and all ballots deposited in the appropriate boxes before any ballots are counted, and the results of the counting shall be entered on duplicate transfer report forms signed by the officials responsible for the counting.

If the county board of elections designates a precinct voting place as a location for voting under this section, and only voters who now reside in that precinct are permitted to vote transfer ballots there, the board may direct the precinct officials to place the transfer ballots in the appropriate precinct ballot boxes immediately after the polls close and to count and report the results of the transfer ballots together with all other ballots voted in the precinct.

(8) A person voting under this section shall be entitled to the same assistance as provided in G.S. 163-152.

(9) The precinct officials and precinct transfer assistant may require a person to show identification if needed to establish that the person is entitled to vote under this section.

(1983, c. 392, s. 2; 1984, Ex. Sess., c. 3, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1984, Ex. Sess., amendment, effective March 8, 1984, added the second sentence of subdivision (a)(1) and rewrote subdivision (a)(7).

SUBCHAPTER V. NOMINATION OF CANDIDATES.

ARTICLE 10.

Primary Elections.

§ 163-106. Notices of candidacy; pledge; with whom filed; date for filing; withdrawal.

Local Modification. — Halifax County Board of Elections: 1983 (Reg. Sess., 1984), c. 984.

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

ARTICLE 13.

General Instructions.

§ 163-140. Kinds of ballots; what they shall contain; arrangement.

CASE NOTES

Applied in Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177 (4th Cir. 1983).

§ 163-151. Marking ballots in primary and election.

CASE NOTES

Constitutionality. — See Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177 (4th Cir. 1983).

ARTICLE 15.

Counting Ballots, Canvassing Votes, and Certifying Results in Precinct and County.

§ 163-170. Rules for counting ballots.

CASE NOTES

Constitutionality. — See Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177 (4th Cir. 1983).

SUBCHAPTER VII. ABSENTEE VOTING.

ARTICLE 20.

Absentee Ballot.

§ 163-227.2. Alternate procedures for requesting application for absentee ballot; "one-stop" voting procedure in board office.

Local Modification. — Orange County: 1983 (Reg. Sess., 1984), c. 978.

SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS.

ARTICLE 22A.

Regulating Contributions and Expenditures in Political Campaigns.

Part 1. In General.

§ 163-278.6. Definitions.

When used in this Article:

(6) The terms "contribute" or "contribution" mean any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift,

pledge or subscription of money or anything of value whatsoever, from any person or individual, whether or not made in an election year, and any contract, agreement, promise or other obligation, whether or not legally enforceable, to make a contribution, in support of or in opposition to any candidate, political committee, referendum committee, or political party. These terms include, without limitation, such contributions as labor or personal services, postage, publication of campaign literature or materials, in-kind transfers, loans or use of any supplies, office machinery, vehicles, aircraft, office space, or similar or related services, goods, or personal or real property. These terms also include, without limitation, the proceeds of sale of services, campaign literature and materials, wearing apparel, tickets or admission prices to campaign events such as rallies or dinners, and the proceeds of sale of any campaign-related services or goods notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate, political committee, or referendum committee.

(1973, c. 1272, s. 1; 1975, c. 798, ss. 5, 6; 1979, c. 500, s. 1; c. 1073, ss. 1-3, 19, 20; 1981, c. 837, s. 1; 1983, c. 331, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. —

Subdivision (6) of this section is set out above to correct an error in the last sentence.

SUBCHAPTER IX. MUNICIPAL ELECTIONS.

ARTICLE 23.

Municipal Election Procedure.

§ 163-279. Time of municipal primaries and elections.

Local Modification. — (As to Art. 23) Town of Walkertown: 1983 (Reg. Sess., 1984), c. 936.

ARTICLE 24.

Conduct of Municipal Elections.

§ 163-291. Partisan primaries and elections.

Local Modification. — (As to Art. 24) Town of Walkertown: 1983 (Reg. Sess., 1984), c. 936.

§ 163-302. Absentee voting.

Local Modification. — City of Cherryville: 1983 (Reg. Sess., 1984), c. 935.

Constitution of North Carolina

Article V.

Finance.

Sec.
11. Capital projects for agriculture.

ARTICLE I

DECLARATION OF RIGHTS

Sec. 2. Sovereignty of the people.

Legal Periodicals. —
For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

Sec. 3. Internal government of the State.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

Sec. 6. Separation of powers.

Legal Periodicals. —
For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

For discussion of separation of powers in North Carolina, see 62 N.C.L. Rev. 1 (1983).

CASE NOTES

Applied in State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983).

Sec. 13. Religious liberty.

CASE NOTES

Jurisdiction Exists over Rights Arising from Church Controversy. — The civil courts have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state. However, the courts do have jurisdiction as to civil, contract and property rights which are involved in, or arise from, a church controversy. African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983), cert. denied, — N.C. —, 312 S.E.2d 649 (1984).

Sec. 14. Freedom of speech and press.

CASE NOTES

Cited in Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983).

Sec. 15. Education.

CASE NOTES

Home Instruction. — Compulsory attendance requirements can be met in public schools or private schools only as expressly permitted by the General Assembly. Because Article 39 of Chapter 115C does not expressly permit home instruction, the State's duty to guard and maintain each child's right to an education cannot be met by allowing home instruction to fulfill compulsory attendance requirements. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Quoted in Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

Sec. 18. Courts shall be open.

CASE NOTES

Exclusion of Former Attorney Not Warranted. — In a special proceeding initiated by the plaintiffs for the partition of certain land held as a tenancy in common, plaintiffs' former attorney was not subject to being excluded from the courtroom merely because he filed a pleading adverse to plaintiffs' interest after they had terminated his services, especially in light of the fact that the record affirmatively disclosed that he did not represent anyone or take part in or affect the trial in any way. Ingram v. Craven, — N.C. App. —, 315 S.E.2d 364 (1984).

Applied in Dixon v. Peters, 63 N.C. App. 592, 306 S.E.2d 477 (1983).

Sec. 19. Law of the land; equal protection of the laws.

CASE NOTES

I. GENERAL CONSIDERATION.

A decision of the Supreme Court of the United States, etc. —

Although the law of the land clause in this section is synonymous with the Fourteenth Amendment due process, federal court interpretations of due process, though highly persuasive, are not binding on North Carolina courts. Thus an independent determination of defendant's constitutional rights under the law of the land provision must be made. Gaston Bd. of Realtors, Inc. v. Harrison, 64 N.C. App. 29, 306 S.E.2d 809 (1983).

Zoning regulations must pass a two-pronged test in order to comply with substantive due process. First, the regulation must be designed to achieve objectives within the scope of the police power. Second, it must seek to achieve those objectives by reasonable means. Whether the means are reasonable depends on their promotion of the public good and their reasonably minimal interference with the property owner's right to use his property as he deems appropriate. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983).

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 306 S.E.2d 186 (1983); In re Rogers, 63 N.C. App. 705, 306 S.E.2d 510 (1983); State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983).

Stated in State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983); In re DeLancy, — N.C. App. —, 313 S.E.2d 880 (1984).

Cited in House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983); State v. Murray, — N.C. —, 313 S.E.2d 523 (1984).

III. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

Just Compensation Part of, etc. —

North Carolina is the only state in the nation that does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without compensation. Nevertheless, the principle is recognized as a fundamental right and is considered an integral part of the "law of the land" within the meaning of this section. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983).

Regulation of Property Based on Aesthetic, etc. —

Regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case. When other worthwhile objectives are also realized (for example, improvement of traffic safety and the protection of property values) the challenged regulation will be deemed to be within the range of permissible purposes properly achieved through use of the police power. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983).

An ordinance is a reasonable use of the police power if the aesthetic purpose outweighs the burdens imposed on the private property owner. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983).

An ordinance which limits the number of signs in a municipality and prevents the use of temporary and windblown signs except under certain specified circumstances is reasonable. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983).

Sec. 22. Modes of prosecution.

CASE NOTES

Applied in State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Sec. 23. Rights of accused.

Legal Periodicals. —

For survey of 1982 law on evidence, see 61 N.C.L. Rev. 1126 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984).

Stated in State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983).

II. RIGHT TO BE INFORMED OF ACCUSATION.

Purpose. —

In accord with 1983 Cum. Supp. See State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

The purpose of this section, which states that every person charged with a crime has the right to be informed of the accusation, is threefold: to enable a defendant to have a fair and reasonable opportunity to prepare his defense; to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense; and to enable the court to proceed to judgment according to the law in the case of a conviction. State v. Stills, — N.C. —, 312 S.E.2d 443 (1984).

IV. RIGHT TO COUNSEL.

It is a cardinal principle of criminal law that an indigent defendant has the right under U.S. Const., 6th amend. to assistance of counsel

for his defense. State v. Luker, 65 N.C. App. 532, 310 S.E.2d 63 (1983).

It is the obligation of the attorney to serve as counselor and advocate to his client. State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983).

Sec. 24. Right of jury trial in criminal cases.

Legal Periodicals. —
For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

Inquiry by Trial Judge as to Jury's Numerical Split. — In the absence of a federal or state constitutional basis requiring the adoption of a per se rule, the North Carolina Supreme Court will look to the "totality of the circumstances" in evaluating a trial judge's inquiry as to a jury's numerical split. State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983).

The context of inquiry as to the jury's numerical split may show that the inquiry is coercive, but such an inquiry is not inherently coercive or violative of this section guarantee of the right to a trial by jury. State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983).

An inquiry into a jury's numerical division is often useful in timing recesses, in determining whether there has been any progress toward verdict, and in deciding whether to declare a mistrial because of a dead-locked jury. State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983).

Sec. 25. Right of jury trial in civil cases.

CASE NOTES

Applied in Huyck Corp. v. C.C. Mangum, Inc., 309 N.C. 788, 309 S.E.2d 183 (1983).

Sec. 32. Exclusive emoluments.

CASE NOTES

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983).

Stated in In re DeLancy, — N.C. App. —, 313 S.E.2d 880 (1984).

Sec. 34. Perpetuities and monopolies.

CASE NOTES

Stated in In re DeLancy, — N.C. App. —, 313 S.E.2d 880 (1984).

ARTICLE II
LEGISLATIVE

Section 1. Legislative power.

Legal Periodicals. — For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

CASE NOTES

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

Sec. 3. Senate districts; apportionment of Senators.

CASE NOTES

Cited in Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983).

Sec. 5. Representative districts; apportionment of Representatives.

CASE NOTES

Cited in Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983).

Sec. 6. Qualifications for Senator.

CASE NOTES

Applied in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 310 S.E.2d 637 (1984).

ARTICLE III
EXECUTIVE

Section 1. Executive power.

CASE NOTES

The Governor has the duty to supervise the official conduct of all executive officers. The constitutional independence of executive offices, and their differing functions and duties,

create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

Sec. 2. Governor and Lieutenant Governor: election, term, and qualifications.

CASE NOTES

The Governor has the duty to supervise the official conduct of all executive officers. The constitutional independence of executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

Sec. 7. Other elective officers.

CASE NOTES

The Governor has the duty to supervise the official conduct of all executive officers. Tice v. Department of Transp., — N.C. App. —, 312 S.E.2d 241 (1984).

ARTICLE IV

JUDICIAL

Section 1. Judicial power.

CASE NOTES

Applied in Dixon v. Peters, 63 N.C. App. 592, 306 S.E.2d 477 (1983).

Sec. 2. General Court of Justice.

Applied in Gentry v. Uniform Judicial Retirement Sys., 378 F. Supp. 1 (M.D.N.C. 1974).

Sec. 12. Jurisdiction of the General Court of Justice.

CASE NOTES

II. SUPREME COURT.

A. In General.

The North Carolina Supreme Court is not a fact-finding body. State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

"Findings" Contemplated in Review of Death Sentences. — While § 15A-2000(d)(2) uses the word "finding" in prescribing the Supreme Court's review of death sentences, a "finding of fact," as that term is generally understood, is not contemplated. Rather, "a finding," as used in that section, means a "determination" or a "conclusion." State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

Section 15A-2000(d)(2) requires the Supreme Court to determine, as a matter of law, whether (1) the record supports the jury's finding of any aggravating circumstance upon which the trial court based its sentence of death, (2) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. The statute neither contemplates nor requires the court to make factual findings. State v. Lawson, — N.C. —, 314 S.E.2d 493 (1984).

Sec. 13. Forms of action; rules of procedure.

CASE NOTES

Quoted in State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983).

ARTICLE V

FINANCE

Sec. 5. Acts levying taxes to state objects.

Editor's Note. — The Editor's note under this section in the Bound Volume should read: "This section is identical to Article V, § 8 of the Constitution of 1868. In 1873, Article V of the Constitution was amended and section 8 became section 7. The cases in the following annotation were decided under Article V, § 7 of the 1868 Constitution as amended in 1873."

Sec. 11. Capital projects for agriculture.

Notwithstanding any other provision of the Constitution the General Assembly may enact general laws to authorize the creation of an agency to issue revenue bonds to finance the cost of capital projects consisting of agricultural facilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the

extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property for any such capital project. (1983, c. 765, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held May 8, 1984.

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Sec. 8. Disqualifications for office.

CASE NOTES

Cited in Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983).

ARTICLE VII

LOCAL GOVERNMENT

Section 1. General Assembly to provide for local government.

Legal Periodicals. — For comment discussing North Carolina's unilateral annexation statutes, see 19 Wake Forest L. Rev. 215 (1983).

ARTICLE IX

EDUCATION

Sec. 3. School attendance.

CASE NOTES

Home Instruction. — Compulsory attendance requirements can be met in public schools or private schools only as expressly permitted by the General Assembly. Because Article 39 of Chapter 115C does not expressly permit home instruction, the State's duty to guard and maintain each child's right to an education cannot be met by allowing home instruction to fulfill compulsory attendance requirements. Delconte v. State, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

Sec. 7. County school fund.

CASE NOTES

This section was designed, etc. —

In accord with original. See Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

The "clear proceeds", etc. —

The term "clear proceeds" as used in this section, is synonymous with "net proceeds." Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

The costs of collection of a fine will be deducted to determine clear proceeds. Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

The words "clear proceeds" in this section have been construed to mean the total amount of the fine, penalty, or forfeiture, less only the cost of collection, which, for a bail bond, is the cost of citing and issuing process against the bondsman in the usual manner. But neither the Constitution nor any statute enacted by the General Assembly states which county is entitled to receive forfeitures in cases that are started in one county and removed to another. In re Dunlap, — N.C. App. —, 310 S.E.2d 415 (1984).

Although defining costs of collection is a legislative function, the North Carolina General Assembly has not seen fit to provide municipalities with a formula for determining "clear proceeds" of fines realized from traffic violations. Lacking guidance on the subject, the court is compelled to resort to a less precise measure in order to allow municipalities to retain the costs of collecting the overtime parking fines. Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

The test for determining permissible deductions from gross moneys taken in is that the item to be deductible must bear a reasonable relation to the costs of collection of the fine. A determination of costs can be made by qualified accountants, which determination is no more complicated than other problems accountants are daily accustomed to resolving. Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

Disposition of Parking Fines Generally. — In the situation of parking fines, the costs of collection often surpass the amounts collected, the intent of the municipality in passing these ordinances being the regulation of traffic rather than the production of revenue. Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

While it is important that the needs of the school children be met, and met generously, it is also important that a municipality feel free to enact ordinances imposing small fines for overtime parking violations without being economically penalized, if indeed the municipality realizes no revenue from the enforcement of these ordinances. Cauble v. City of Asheville, — N.C. App. —, 311 S.E.2d 889 (1984).

Applied in In re Phillips, — N.C. App. —, 311 S.E.2d 365 (1984).

Appendix I. Rules of Practice in the General Court of Justice

(2A) NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Article III. Review by Supreme Court of Appeals Originally Docketed in Court of Appeals: Appeals of Right; Discretionary Review

Rule

16. Scope of Review of Decisions of Court of Appeals.

(a) How Determined.

(b) Scope of Review in Appeal Based Solely Upon Dissent.

(c) Appellant, Appellee Defined.

ARTICLE I. APPLICABILITY OF RULES

Rule 1

Scope of Rules: Trial Tribunal Defined

CASE NOTES

Quoted in Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

Rule 2

Suspension of Rules

CASE NOTES

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, — N.C. App. —, 314 S.E.2d 566 (1984).

Applied in State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983); State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983); Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984); Wachovia Bank & Trust Co. v. Guthrie, — N.C. App. —, 313 S.E.2d 603 (1984).

Stated in In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

Cited in State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983); State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983); Plymouth Fertilizer Co. v. Selby, — N.C. App. —, 313 S.E.2d 885 (1984).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3

Appeal in Civil Cases—How and When Taken

CASE NOTES

The provisions of § 1-279 and this rule, etc. —

In accord with 1st paragraph in 1983 Cum. Supp. See First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983).

Applied in Henderson v. Provident Life & Accident Ins. Co., 62 N.C. App. 476, 303 S.E.2d 211 (1983).

Rule 4

Appeal in Criminal Cases—How and When Taken

CASE NOTES

Cited in State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Higson, — N.C. —, 312 S.E.2d 437 (1984).

Rule 9

The Record on Appeal—Function, Composition, and Form

CASE NOTES

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, — N.C. App. —, 314 S.E.2d 566 (1984).

Applied in Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983); State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); Hayworth v. Brooks Lumber Co., 65 N.C. App. 555, 309 S.E.2d 572 (1983); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984).

Stated in State v. Nickerson, 62 N.C. App. 754, 303 S.E.2d 569 (1983); Oxendine v. Moss, 64 N.C. App. 205, 306 S.E.2d 831 (1983).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

CASE NOTES

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, — N.C. App. —, 314 S.E.2d 566 (1984).

This rule functions as an important vehi-

cle to insure that errors are not "built into" the record, thereby causing unnecessary appellate review. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Party may not, after trial and judgment, comb through the transcript and randomly insert an exception notation in disregard of the mandates of section (b) of this rule. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

For discussion of the "plain error rule," see In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

An objection to testimony not taken in apt time, etc. —

Failure to make contemporaneous objection to the jury charge prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

Failure to Except to Jury Instructions. — Defendant waived his right to assign error to certain instructions on appeal where, at trial, before the judge had completed his final instructions to the jury, the judge called the attorneys to the bench and inquired whether either attorney had any further requests, additions, or corrections regarding the instructions to the jury and both attorneys responded negatively, since defense counsel had the opportunity to make an objection out of the hearing of the jury but made no objection at trial. State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983).

Burden of Establishing Right to Review Where Not Raised at Trial. — Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Issue Not Preserved by Cross-Assignment. — Because plaintiff's cross-assignment of error did not present an alternative basis upon which to support the judgment, the question argued therein was not properly before the Court of Appeals; the proper method to have preserved this issue for review would have been a cross-appeal. Stanback v. Westchester Fire Ins. Co., — N.C. App. —, 314 S.E.2d 775 (1984).

Where in her cross-assignments of error the defendant did not contend that the trial court's order deprived her of additional bases supporting the court's order, but rather, that certain portions of the order were erroneous, the proper means by which to raise such an attack would have been an independent appeal, rather than a cross-assignment of error, and defendant's cross-assignments of error were therefore overruled. Whedon v. Whedon, — N.C. App. —, 314 S.E.2d 794 (1984).

Applied in Martin-Kahill Ford Lincoln Mercury, Inc. v. Skidmore, 62 N.C. App. 736, 303 S.E.2d 392 (1983); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983); State v. Williams, 309 N.C. 170, 305 S.E.2d 519 (1983); In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); State v. Cantrell, 64 N.C. App. 207, 306 S.E.2d 555 (1983); State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); State v. Jones, 64 N.C. App. 505, 307 S.E.2d 823 (1983); City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983); State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983); State v. Kelley, 65 N.C. App. 159, 308 S.E.2d 720 (1983); State v. Squalls, 65 N.C. App. 599, 309 S.E.2d 558 (1983); Hayworth v. Brooks Lumber Co., 65 N.C. App. 555, 309 S.E.2d 572 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983); State v. Simmons, 65 N.C. App. 804, 310 S.E.2d 139 (1984); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); State v. Queen, 65 N.C. App. 820, 310 S.E.2d 153 (1984); State v. Bunn, — N.C. App. —, 310 S.E.2d 792 (1984); State v. Haight, — N.C. App. —, 310 S.E.2d 795 (1984); B & H Supply Co. v. Insurance Co. of N. Am., — N.C. App. —, 311 S.E.2d 643 (1984); State v. Cauthen, — N.C. App. —, 311 S.E.2d 649 (1984); State v. Roberts, — N.C. —, 312 S.E.2d 477 (1984); Faught v. Faught, — N.C. App. —, 312 S.E.2d 504 (1984); State v. Bradley, — N.C. App. —, 312 S.E.2d 519 (1984); Housing Auth. v. Clinard, — N.C. App. —, 312 S.E.2d 524 (1984); State v. Byrd, — N.C. App. —, 312 S.E.2d 528 (1984); State v. Joyner, — N.C. App. —, 312 S.E.2d 681 (1984); State v. Williams, — N.C. App. —, 313 S.E.2d 236 (1984); State v. Bennett, — N.C. App. —, 313 S.E.2d 277 (1984); Wachovia Bank & Trust Co. v. Guthrie, — N.C. App. —, 313 S.E.2d 603 (1984); State v. Aldridge, — N.C. App. —, 314 S.E.2d 139 (1984); Texaco, Inc. v. Creel, — N.C. —, 314 S.E.2d 506 (1984).

Stated in State v. Davis, 64 N.C. App. 186, 306 S.E.2d 829 (1983); Nationwide Mut. Fire Ins. Co. v. Allen, — N.C. App. —, 314 S.E.2d 552 (1984).

Cited in State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983); State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); State v. Canty, 309 N.C. 634, 308 S.E.2d 719 (1983); State v. Atkins, — N.C. App. —, 310 S.E.2d 629 (1984); In re Estate of Forrest, —

N.C. App. —, 311 S.E.2d 341 (1984); State v. Beasley, — N.C. App. —, 311 S.E.2d 347 (1984); Douglas v. J.C. Penney Co., — N.C. App. —, 313 S.E.2d 176 (1984); Gate City Printing, Inc. v. Glace-Holden, Inc., — N.C. App. —, 313 S.E.2d 209 (1984); In re Barefoot, — N.C. App. —, 313 S.E.2d 924 (1984); Livingston v. City of Charlotte, — N.C. App. —, 314 S.E.2d 303 (1984); Citrini v. Goodwin, — N.C. App. —, 315 S.E.2d 354 (1984).

Rule 11

Settling the Record on Appeal; Certification

CASE NOTES

Court Presumed to Have Acted Correctly Where Record Silent. — Where the record is silent as to whether a jury instruction conference was in fact held, the defendant must hold himself accountable. The defendant, as appellant, has the duty under this rule to preserve the record on appeal. If there was no instruction conference held, the defendant could have sought a stipulation from the State pursuant to subdivision (a) of this rule acknowledging the trial court's failure in this regard. Had the State refused to agree to the stipulation, and objected to such a notation in the record, then the defendant could have requested that the trial judge settle the record on appeal pursuant to subdivision (c) of this rule. Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Cited in Berger v. Berger, — N.C. App. —, 313 S.E.2d 825 (1984).

Rule 12

Filing the Record: Docketing the Appeal: Copies of Record

CASE NOTES

Cited in State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14

Appeals of Right from Court of Appeals to Supreme Court Under G.S. § 7A-30

CASE NOTES

Cited in Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984).

Rule 15

Discretionary Review on Certification by Supreme Court Under G.S. § 7A-31

CASE NOTES

Applied in Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984).

Cited in Bell v. Brock, — N.C. —, 312 S.E.2d 880 (1983).

Rule 16

Scope of Review of Decisions of Court of Appeals

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. No assignments or cross-assignments of error to the decision of the Court of Appeals are required as the basis for the presentation of questions for review by the Supreme Court. A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals. A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

(b) **Scope of Review in Appeal Based Solely Upon Dissent.** Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent and are properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) **Appellant, Appellee Defined.** As used in this Rule 16, the terms *appellant* and *appellee* have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, *appellant* means the party aggrieved by the decision of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification the

Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 16.

Effect of Amendments. — The amendment adopted November 3, 1983, and effective with notices of appeal filed in the Supreme Court after January 1, 1984, rewrote the second sentence of subsection (a), added present subsection (b), and designated former subsection (b) as subsection (c).

CASE NOTES

Cited in Colonial Pipeline v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984).

ARTICLE V. EXTRAORDINARY WRITS

Rule 21

Certiorari

CASE NOTES

Applied in Latch v. Latch, 63 N.C. App. 498, 305 S.E.2d 564 (1983); Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983).

Cited in State v. Milby, — N.C. —, 305 S.E.2d 189 (1983); State v. Pitts, 309 N.C. 324, 307 S.E.2d 172 (1983); State v. McDaniel, — N.C. —, 307 S.E.2d 371 (1983); State v. Thompson, — N.C. —, 308 S.E.2d 64 (1983); State v. Langley, — N.C. —, 311 S.E.2d 289 (1983); State v. Crews, — N.C. —, 311 S.E.2d 290 (1983); State v. Jeffus, — N.C. —, 311 S.E.2d 590 (1983); Industrotech Constructors, Inc. v. Duke Univ., — N.C. App. —, 314 S.E.2d 272 (1984).

ARTICLE VI. GENERAL PROVISIONS

Rule 28

Briefs; Function and Content

CASE NOTES

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, — N.C. App. —, 314 S.E.2d 566 (1984).

Abandonment of Issue. — Where defendant failed to argue in his brief an alleged error made by the trial court, the issue was deemed abandoned. State v. Davis, — N.C. App. —, 314 S.E.2d 828 (1984).

Applied in Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981); State v. Green, 309 N.C. 623, 308 S.E.2d 326 (1983); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983); State v. Collins, 64 N.C. App. 656, 308 S.E.2d 353 (1983); Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983); Wall v. Stout, — N.C. —, 311 S.E.2d 571 (1984); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); Taylor v. Gillespie, — N.C. App. —, 311 S.E.2d 362 (1984); Chrysler Credit Corp. v. Rebhan, — N.C. App. —, 311 S.E.2d 606 (1984); Faught v. Faught, — N.C. App. —, 312 S.E.2d 504 (1984).

Stated in State v. Nickerson, 62 N.C. App. 754, 303 S.E.2d 569 (1983); Patterson v. DAC Corp., — N.C. App. —, 310 S.E.2d 783 (1984); Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 313 S.E.2d 803 (1984).

Cited in Brown v. North Carolina Wesleyan College, Inc., 65 N.C. App. 579, 309 S.E.2d 701 (1983); State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983); Curl ex rel. Curl v. Key, 64 N.C. App. 139, 306 S.E.2d 818 (1983); State v. Kelley, 65 N.C. App. 159, 308 S.E.2d 720 (1983); Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); Warren v. Joseph Harris Co., — N.C. App. —, 313 S.E.2d 901 (1984); In re Barefoot, — N.C. App. —, 313 S.E.2d 924 (1984).

Rule 33

Attorneys

CASE NOTES

Subsection (a) of this rule is not applicable in criminal cases involving court-appointed counsel. State v. Carter, — N.C. App. —, 311 S.E.2d 5 (1984).

Rule 37

Motions in Appellate Courts

CASE NOTES

Applied in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

1. Philosophy of General Rules of Practice.

CASE NOTES

Applied in Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983).

3. Continuances.

CASE NOTES

Applied in Butler Serv. Co. v. Butler Serv. Group, Inc., — N.C. App. —, 310 S.E.2d 406 (1984).

8. Discovery.

CASE NOTES

Stated in Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

10. Opening and Concluding Arguments.

CASE NOTES

The trial court did not err by granting defendant the right to open and close the final jury arguments where defendant offered no evidence of his own, but was called to testify by plaintiff as an adverse witness. Hord v. Atkinson, — N.C. App. —, 315 S.E.2d 339 (1984).

21. Jury Instruction Conference.

CASE NOTES

This Rule Provides for Unrecorded Conference Where Recorded Conference Not Requested. — If either party to the trial desires a recorded instruction conference, § 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, § 15A-1231(b) is silent and this rule supplements the statute by requiring the trial court to hold an unrecorded conference. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Failure to make contemporaneous objection to the jury charge prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, — N.C. App. —, 315 S.E.2d 323 (1984).

Court Presumed to Have Acted Correctly Where Record Silent. — Where the record is silent as to whether a jury instruction conference was in fact held, the defendant must hold himself accountable. The defendant, as appellant, has the duty under Rule 11 of the Rules of Appellate Procedure to preserve the record on appeal. If there was no instruction conference held, the defendant could have sought a stipulation from the State pursuant to Rule 11(a) acknowledging the trial court's failure in this regard. Had the State refused to agree to the stipulation, and objected to such a notation in the record, then the defendant could have requested that the trial judge settle the record on appeal pursuant to Rule 11(c). Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Applied in Radford v. Norris, 63 N.C. App. 501, 305 S.E.2d 64 (1983).

Appendix II. Rules of Practice in United States District Courts and Bankruptcy Courts

(1) United States District Court for the Middle District of North Carolina

Table of Rules

II. Civil Rules

Rule
19. Filing of Papers and Service.
(f) Discovery Materials Not to Be Filed Unless Ordered or Needed.

II. Civil Rules

Rule 19.

FILING OF PAPERS AND SERVICE

(f) Discovery Materials Not to Be Filed Unless Ordered or Needed. Depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed unless on order of the Court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the Clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

Comment

This rule does not change any requirement for giving or filing of notices, or service of papers filed with the Clerk. Any party seeking pretrial relief based on discovery material which has not been filed with the Clerk must identify the specific, pertinent material and ensure that it is filed contemporaneously with the application for relief. The Court will ordinarily issue an ex-parte order requiring filing of necessary discovery materials.

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Effect of Amendments. — The amendment adopted September 2, 1980, added section (f).

(1A) United States Bankruptcy Court for the Middle District of North Carolina

Rules of Court

As amended to May 18, 1984.

PART I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

RULE

LBR-1007 Mailing Matrix Required
LBR-1009 Certificate of Service Required For Amendment to Petitions, Schedules or Statements

PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

LBR-2002 General Notice Period
LBR-2003 Retention of Creditors Meeting Tapes for Six Months
LBR-2015 Search Fee Charged by Chapter 13 Trustee
LBR-2016 Period for Filing Attorney Compensation Disclosure Statement

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

LBR-3003 Chapter 11 Claims
(a) Period for Filing Chapter 11 Claims
(b) Debtor Notification of Chapter 11 Creditor of Disputed, Contingent or Unliquidated Claim
LBR-3010 Payments to Chapter 13 Creditors
LBR-3012 Trustee Valuation of Creditor's Security

PART IV. THE DEBTOR: DUTIES AND BENEFITS

LBR-4001 Special Relief from Stay Provisions
(a) Lifting of Stay Upon Abandonment
(b) Secured Creditor Contact with Chapter 13 Debtor
(c) Taxing Authority Actions Authorized
(d) Notice of Request to Recover Attorneys' Fees
LBR-4003 Local Exempt Property Claim Form Required

PART V. BANKRUPTCY COURTS AND CLERKS

LBR-5005 Routing of Documents Through Clerk's Office

PART VII. ADVERSARY PROCEEDINGS

LBR-7003 Adversary Proceeding Cover Sheet Required
LBR-7067 Registry Accounts

PART IX. GENERAL PROVISIONS

LBR-9007 General Notice Provisions
(a) Designation of Parties to Provide Notice
(b) Service Required on Trustee and Attorney for Debtor-In-Possession
LBR-9010 Attorney Representation in the Bankruptcy Court
(a) Persons Who May Practice Before the Bankruptcy Court
(b) Attorney Representation of Debtor

LOCAL FORMS
Exhibit #1 Exempt Property Claim Form (91-C)
Exhibit #2 Adversary Proceeding Cover Sheet (BC-104)

Part I. Commencement of Case; Proceedings Relating to Petition and Order for Relief

Rule No. LBR-1007

Mailing Matrix Required

As a requirement of filing, all Chapter 7 and 11 bankruptcy petitions must be accompanied by an alphabetized matrix containing the names and addresses of all parties-in-interest, including the debtor, debtor's attorney, creditors and appropriate governmental agencies. The matrix shall be prepared according to the forms and instructions provided upon request by the Clerk's Office.

Rule No. LBR-1009

Certificate of Service Required for Amendment to Petitions, Schedules or Statements

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served, certified by the person who made the service.

Part II. Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants

Rule No. LBR-2002

General Notice Period

The period of notice of hearing or objection required in the Bankruptcy Rules shall be ten (10) days, unless Bankruptcy Rule 2002, other Bankruptcy Rule, or the Court otherwise provides.

Rule No. LBR-2003

Retention of Creditors Meeting Tapes for Six Months

The Clerk shall retain and preserve the taped recordings of the meetings of creditors required by § 341 of the Bankruptcy Code for a period of six (6) months from the date first set for said meeting. After the expiration of six (6) months from said date, the Clerk is authorized to erase or otherwise destroy the aforementioned taped recordings, unless otherwise ordered by the Court.

Rule No. LBR-2015

Search Fee Charged by Chapter 13 Trustee

The Standing Chapter 13 Trustees are authorized to charge a two dollar ($2) search fee when answering inquiries which require a search of the records for each case with respect to which the inquiry is made, to use as a part of their operating expenses. Said Trustees shall account to the Court for such funds so collected.

Rule No. LBR-2016

Period for Filing Attorney Compensation Disclosure Statement

The disclosure of attorney compensation required by § 329 of the Bankruptcy Code must be filed with the Court within fifteen (15) days of the date the original petition is filed.

Part III. Claims and Distribution to Creditors and Equity Interest Holders; Plans

Rule No. LBR-3003

Chapter 11 Claims

(a) Period for Filing Chapter 11 Claims.

In a Chapter 11 case, a proof of claim (if required to be filed) shall be filed within ninety (90) days after the date first set for the meeting of creditors called pursuant to § 341(a) of the Bankruptcy Code, except as otherwise specified by order of this Court.

(b) Debtor Notification of Chapter 11 Creditor of Disputed, Contingent or Unliquidated Claim.

In Chapter 11 cases, the debtor shall notify each creditor whose claim is listed on the debt schedules as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the Schedule of Assets and Liabilities or within fifteen (15) days after addition of such creditor to the petition. Within three (3) days after service has been made, the debtor shall mail a certificate of service to the Clerk's Office. Failure to notify a creditor that his claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent or unliquidated, as though a proof of claim had been filed by the creditor.

Rule No. LBR-3010

Payments to Chapter 13 Creditors

Bankruptcy Rule 3010(b) is amended to the extent that Standing Chapter 13 Trustees are authorized to make payments to creditors in amounts smaller than $15 without waiting until that creditor's dividends accumulate to $15. The decision as to whether to make smaller payments shall be made in each case by the Trustee and such decision shall be solely the Trustee's discretion as to the best administration of the individual estate.

Rule No. LBR-3012

Trustee Valuation of Creditor's Security

After notice, a Chapter 13 Trustee may determine the value of a creditor's security at the § 341 creditors meeting, and unless an objection is filed within ten (10) days after notice of such valuation, the Court may accept the valuation for the purpose of distribution under the Plan.

Part IV. The Debtor: Duties and Benefits

Rule No. LBR-4001

Special Relief from Stay Provisions

(a) Lifting of Stay Upon Abandonment.

In Chapter 7, 11, and 13 cases, the abandonment of property pursuant to § 554 of the Bankruptcy Code shall have the effect of lifting the automatic stay (of § 362(a) of the Bankruptcy Code) with respect to the property abandoned.

(b) Secured Creditor Contact with Chapter 13 Debtor.

In Chapter 13 cases, affected secured creditors may:

1. Inquire of the debtor about the status of insurance coverage on property used as collateral;
2. If paid directly to the creditor, contact the debtor to inquire about such payments.

(c) Taxing Authority Actions Authorized.

In Chapter 7 and 13 cases, the Internal Revenue Service and the North Carolina Department of Revenue are authorized:

1. To assess tax liability shown on voluntarily filed returns and other agree-to-tax liabilities;
2. To offset against any refund due a debtor in a Chapter 7 or 13 case, any tax due the United States government;
3. To assess any tax liability satisfied by offsetting any refund, when such liability has not been assessed previously; and
4. To make income tax refunds, in the ordinary course of business, directly to the debtor unless otherwise directed by the Court or otherwise instructed by the Chapter 7 or Chapter 13 Trustee.

In Chapter 13 cases only, upon the filing of a proof of claim with the Standing Trustee's office by the Internal Revenue Service or State, County or City Departments of Revenue, said claim shall be recognized as a priority claim to be paid in said Chapter 13 case unless objected to or otherwise directed by the Court in a specific case.

(d) Notice of Request to Recover Attorneys' Fees.

In all bankruptcy cases, the automatic stay provided for by § 362 of the Bankruptcy Code is modified to permit counsel requesting recovery of attorneys' fees pursuant to § 506(b) of the Bankruptcy Code to give the "five-day notice" required by North Carolina General Statutes § 6-21.2(5) or such similar notice as may be required by other states.

Rule No. LBR-4003

Local Exempt Property Claim Form Required

Except in unusual circumstances, each debtor who is an individual in a Chapter 7 case shall file a claim for exempt property pursuant to § 522(b)(1) of the Bankruptcy Code, if at all, on Local Form #91-C, which form is available from the Clerk of this court; the debtor's filing of Local Form #91-C must be referenced in Schedule B-4 of the debtor's schedules.

Part V. Bankruptcy Courts and Clerks

Rule No. LBR-5005

Routing of Documents Through Clerk's Office

All pleadings (including but not limited to complaints, answers, motions and applications), and all prepared orders, shall be tendered by the party submitting such document to the Clerk's Office, rather than directly to the Judge, and the Clerk's Office shall first accomplish any necessary processing of such document, before such document is forwarded to any Judge of this Court for consideration.

Part VII. Adversary Proceedings

Rule No. LBR-7003

Adversary Proceeding Cover Sheet Required

All complaints initiating adversary proceedings in Chapter 7, 11 and 13 bankruptcy cases shall be accompanied by a fully completed Bankruptcy Cover Sheet (Form BC-104), containing the complete information as listed therein.

Rule No. LBR-7067

Registry Accounts

In the event that a depository intended by the Court to receive registry funds is not, immediately upon the Court's receipt of the registry funds, able to pledge sufficient collateral for receipt of those funds, such funds may be retained temporarily in non-interest-bearing U. S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

Part IX. General Provisions

Rule No. LBR-9007

General Notice Provisions

(a) Designation of Parties to Provide Notice.

The Clerk of this Court is authorized to designate the parties who shall provide such notice to creditors and parties-in-interest as required under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of Court.

(b) Service Required on Trustee and Attorney for Debtor-In-Possession.

Any and all filings (except claims) in all proceedings and cases under the Bankruptcy Code must be served on the Trustee (including the Standing Chapter 13 Trustee) whether or not such Trustee is a party to the proceeding. In Chapter 11 cases, the attorney for the debtor-in-possession is to be served in like manner in all proceedings.

Rule No. LBR-9010

Attorney Representation in the Bankruptcy Court

(a) Persons Who May Practice Before the Bankruptcy Court.

Only those persons who are admitted to practice before the United States District Court for this District will be allowed to practice before this Court, although licensed attorneys may be permitted by the Court to appear on an ad hoc basis.

(b) Attorney Representation of Debtor.

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved from representation upon application and court order.

LOCAL FORMS

Form 91-C

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

In the Matter of:) Case No. _____
)
) DEBTOR'S CLAIM FOR
) PROPERTY EXEMPTIONS
)
)
Debtor.)

I, _____, the undersigned debtor, hereby claim the following property as exempt pursuant to Chapter 1C, Article 16, § 1C-1601 et seq. of the North Carolina General Statutes.

1. REAL OR PERSONAL PROPERTY USED BY DEBTOR OR DEBTOR'S DEPENDENT AS RESIDENCE OR BURIAL PLOT. (Total net value not to exceed $7,500. Amount of the unused portion of first $2,500 may be carried forward to be applied on other property claimed as exempt.)

Description of Property & Address	Market Value	Mtg. Holder or Lien Holder	Amt. Mtg. or Lien	Net Value

(a) Total Net Value $_____
Total Net Exemption $_____

(b) Unused portion of first $2,500. (This amount, if any, may be used to claim an exemption in any property owned by the debtor.) $_____

2. MOTOR VEHICLE. (Only one vehicle allowed under this paragraph with net value claimed as exempt not to exceed $1,000 plus any portion desired for use from paragraph 1 (b) above.)

Model, Year Style of Auto	Market Value	Lien Holder	Amt. Lien	Net Value

(a) Statutory allowance $1,000

(b) Amount from 1 (b) above to be used in this paragraph. (A part or all of 1 (b) may be used as needed.) $_____

Total Net Exemption $_____

3. TOOLS OF TRADE OR PROFESSIONAL BOOKS. (Used by Debtor or Debtor's dependent. Total net value of all items claimed as exempt not to exceed $500.00.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

(a) Statutory allowance $ 500

(b) Amount from 1 (b) above to be used in this paragraph. (A part or all of 1 (b) may be used as needed.) $_____

Total Net Exemption $_____

4. PERSONAL PROPERTY USED FOR HOUSEHOLD OR PERSONAL PURPOSES NEEDED BY DEBTOR OR DEBTOR'S DEPENDENTS. (Debtor's total net value not to exceed $2,500 plus $500 for each dependent, but not to exceed $2,000 total for all dependents.)

Description of Property	Market Value	Lien Holder	Amt. Lien	Net Value
Clothing & Personal				
Kitchen Appliances				
Stove				
Refrigerator				
Freezer				
Washing Machine				
Dryer				
China				
Silver				
Jewelry				
Living Room Furniture				
Den Furniture				
Bedroom Furniture				
Dining Room Furniture				
Lawn Furniture				
Television				
( ) Stereo ( ) Radio				
Musical Instruments				
( ) Piano ( ) Organ				
Air Conditioner/Dehumid.				
Paintings & Art				
Lawn Mower				
Yard Tools				
Crops				
Animals				
Recreational Equipment				

Total Net Value _____

(a) Statutory allowance for debtor $2,500

(b) Statutory allowance for debtor's dependents: _____ dependents at $500 each (not to exceed $2,000 for total dependents) _____

(c) Amount from 1 (b) above to be used in this paragraph. (A part or all of 1 (b) may be used as needed.) _____

Total Net Exemption _____

5. LIFE INSURANCE. (As provided in Article X, Section 5 of North Carolina Constitution.)

Name of Insurance Company _____ Policy No. _____

Name of Insured _____ Policy Date _____

Name of Beneficiary _____

6. PROFESSIONALLY PRESCRIBED HEALTH AIDS (FOR DEBTOR OR DEBTOR'S DEPENDENTS). (No limit on value or number of items.)

Description: _____

_____

7. DEBTOR'S RIGHT TO RECEIVE FOLLOWING COMPENSATION: (No limit on number or amount.)

A. $ _____ Compensation for personal injury to debtor or to person on whom debtor was dependent for support.

B. $ _____ Compensation for death of person on whom debtor was dependent for support.

8. ANY OTHER REAL OR PERSONAL PROPERTY WHICH DEBTOR DESIRES TO CLAIM AS EXEMPT THAT HAS NOT PREVIOUSLY BEEN CLAIMED ABOVE. (THE AMOUNT CLAIMED MAY NOT EXCEED THE REMAINING AMOUNT AVAILABLE UNDER PARAGRAPH 1 (b) WHICH HAS NOT BEEN USED FOR OTHER EXEMPTIONS.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

(a) Total Net Value of property claimed in paragraph 8. $ _____
(b) Total amount available from paragraph 1 (b). $ _____
(c) Less amount available under paragraph 1 (b) which was used in other paragraphs:
Paragraph 2 (b) $ _____
Paragraph 3 (b) $ _____
Paragraph 4 (c) $ _____
Net Balance Available from paragraph 1 (b) $ _____
Total Net Exemption $ _____

9. THE FOLLOWING TANGIBLE PERSONAL PROPERTY WAS PURCHASED BY THE DEBTOR WITHIN 90 DAYS OF THE FILING OF THE BANKRUPTCY PETITION:

Description	Market Value	Lien Holder	Amt. Lien	Net Value

None of the property listed in paragraph 9 has been included in this Request for Exempt Property. (Tangible personal property purchased within 90 days of the filing of the petition cannot be exempted.)

DATE: _____ _____
Debtor

BC 104
(Rev. 7/82)

BANKRUPTCY COVER SHEET

The BC104 Bankruptcy Cover Sheet and the information contained herein neither replace nor supplement the filing and service of other papers as required by law or by local rules of court. This form, is required for the use of the clerk of the Bankruptcy Court for the purpose of initiating the bankruptcy docket sheet for proceedings under 28 U.S.C. 1471.

PLAINTIFFS	DEFENDANTS
ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	ATTORNEYS (IF KNOWN)

(PLACE AN ☒ IN ONE BOX ONLY) PARTY

☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☐ 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED.)

(PLACE AN ☒ IN ONE BOX ONLY) NATURE OF SUIT

☐ 110 INSURANCE	☐ 355 MOTOR VEHICLE PRODUCT LIABILITY	☐ 432 TURNOVER COMPLAINT BY TRUSTEE
☐ 130 MILLER ACT	☐ 362 PERSONAL INJURY MED MALPRACTICE	☐ 433 SALE FREE AND CLEAR OF LIENS
☐ 140 NEGOTIABLE INSTRUMENT	☐ 365 PERSONAL INJURY PRODUCT LIABILITY	☐ 434 INJUNCTIVE RELIEF
☐ 160 STOCKHOLDERS SUITS	☐ 370 FRAUD OR TRUTH-IN-LENDING	☐ 435 DETERMINE VALIDITY, PRIORITY & EXTENT OF LIEN
☐ 195 CONTRACT PRODUCT LIABILITY	☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY	☐ 436 SELLER RECLAMATION 546 (c)
☐ 210 CONDEMNATION	☐ 410 ANTI-TRUST	☐ 437 TRANSFER AND OBLIGATION AVOIDANCE BY TRUSTEE
☐ 230 RENT LEASE & EJECTMENT	☐ 418 AUTOMATIC STAY LITIGATION	☐ 438 LIEN AVOIDANCE BY DEBTOR 522(f)
☐ 240 TORTS TO LAND	☐ 424 OBJ/REVOCATION DISCHARGE 727	☐ 439 LIEN ENFORCEMENT (RECLAMATION)
☐ 245 TORT PRODUCT LIABILITY	☐ 425 DISCHARGEABILITY 523 (a) (2)	☐ 450 COMMERCE ICC RATES, ETC.
☐ 310 AIRPLANE	☐ 426 DISCHARGEABILITY 523 (a) (4)	☐ 540 MANDAMUS & OTHER
☐ 315 AIRPLANE PRODUCT LIABILITY	☐ 427 DISCHARGEABILITY 523 (a) (5)	☐ 850 SECURITIES COMMODITIES EXCHANGE
☐ 320 ASSAULT LIBEL & SLANDER	☐ 428 DISCHARGEABILITY 523 (a) (6)	☐ 870 TAXES
☐ 330 FEDERAL EMPLOYER'S LIABILITY	☐ 429 DISCHARGEABILITY (OTHER)	☐ 820 COPYRIGHT
☐ 345 MARINE PRODUCT LIABILITY	☐ 430 BANKS AND BANKING	☐ 830 PATENT
☐ 350 MOTOR VEHICLE	☐ 431 RECOVER ACCOUNTS RECEIVABLE	☐ 840 TRADEMARK
		☐ 499 OTHER ACTIONS

(PLACE AN ☒ IN ONE BOX ONLY) ORIGIN

☐ 1 ORIGINAL PROCEEDING ☐ 2 REMOVED FROM STATE/DISTRICT COURT ☐ 3 REMANDED FROM APPELLATE COURT ☐ 4 REINSTATED OR REOPENED ☐ 5 TRANSFERRED FROM ANOTHER BANKRUPTCY COURT (SPECIFY DISTRICT) ☐ 6 MULTIDISTR LITIGATION

UNITED STATES BANKRUPTCY COURT

(Continued on Reverse Side)

BC 104
(Rev. 7/82)

BANKRUPTCY COVER SHEET (Reverse Side)

REMARKS	*Check/Fill in if demanded in complaint:*		
	☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND $	OTHER
	RELATED PROCEEDING(S), IF ANY, PENDING		
	JUDGE _____	BANKRUPTCY DOCKET NUMBER _____	
	PROCEEDINGS RISING OUT OF BANKRUPTCY CASES ARE DEEMED RELATED IF PROCEEDINGS INVOLVE:		
	☐ 1. SAME PROPERTY		
	☐ 2. SAME ISSUE OF FACT OR SAME TRANSACTION		
Check YES only if demanded in complaint:	☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT COPYRIGHT OR TRADEMARK		
JURY DEMAND: ☐ YES ☐ NO			

DATE SIGNATURE OF ATTORNEY OF RECORD

INSTRUCTIONS

Form BC 104, Bankruptcy Cover Sheet, and the information contained therein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the clerk of the bankruptcy court in initiating the bankruptcy docket sheet for adversary proceedings under 28 U.S.C. Section 1471, and to facilitate the gathering of statistical information. Accordingly, a bankruptcy proceeding cover sheet is to be submitted to the clerk of the bankruptcy court for each complaint filed. The form is largely self explanatory. Two areas needing possible explanation are the CAUSE OF ACTION and NATURE OF SUIT portions of the form.

Under *Cause of Action* give a brief narrative description of the cause of action including all Federal statutes involved. For example, "Complaint seeking damages for failure to disclose information, Consumer Credit Protection Act, 15 U.S.C. 1601 et. seq.".

Under *Nature of Suit* place an "X" in the appropriate box. Only one box should be checked. If the cause fits more than one nature of suit, select the most definitive. This list is not all-inclusive. If the action does not fall within one of the specifically listed categories, you should check #499, other actions, [e.g., a tort action other than one specifically listed or an action pursuant to E.R.I.S.A.].

Because there are several categories involving liens, the following additional information should be used as a guide in making the proper selection.

#437 Transfer and Obligation Avoidance By Trustee — Complaint by a trustee to avoid a transfer, lien or obligation pursuant to any of a trustee's powers to do so.

#433 Sale Free and Clear of Lien — Complaint to sell property free and clear of any interest in such property.

#439 Lien Enforcement (Reclamation) — Complaint by a party who has a lien against property of the estate seeking to 1) terminate or modify the automatic stay, 2) obtain possession, and 3) foreclose all other interests in the property. If a secured party seeks only to lift the stay with respect to such property, then #418 automatic stay litigation should be checked.

#435 Determine Validity, Priority or Extent of Lien — Complaint asking court to make a determination involving a question of a lien's validity, priority or amount.

#438 Lien Avoidance By Debtor §522 — Complaint by debtor to avoid a lien to the extent it impairs an exemption.

If this adversary proceeding is related to any other pending adversary proceeding, enter the six digit adversary proceeding docket number in the space indicated. ALSO indicate in the "Remarks" portion of the form the name of the debtor in, and the name of the docket number of, the bankruptcy case out of which the proceeding arose, and identify the district where the bankruptcy case is pending or was pending when closed, if different from the district in which this proceeding is being filed.

(2A) United States Bankruptcy Court for the Eastern District of North Carolina

Rules of Court

Adopted December 1, 1983.

IN RE:
LOCAL BANKRUPTCY RULES ORDER

It appearing that local bankruptcy rules would facilitate the administration of bankruptcy cases in this District, and would assist the Court in the management of contested matters and adversary proceedings; and

It further appearing that Bankruptcy Rule 9029 authorizes the promulgation of local bankruptcy rules not inconsistent with the official Bankruptcy Rules; now therefore,

IT IS ORDERED that the bankruptcy rules attached hereto are hereby adopted and shall be referred to as Local Bankruptcy Rules, EDNC, and shall be numbered in such a way as to refer to the official Bankruptcy Rules.

Entered this first day of December, 1983.

s/Thomas M. Moore
Judge

s/A. Thomas Small
Judge

PREFACE

The Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of North Carolina are adopted to facilitate the administration of bankruptcy cases, to assist the Court in the management of contested matters and adversary proceedings and to provide for variations in the local practice in this Court.

The numbering system for the Local Bankruptcy Rules is patterned after the Bankruptcy Rules which became effective August 1, 1983. Each local rule is keyed to an appropriate Bankruptcy Rule number and is numbered with a decimal to such Bankruptcy Rule number. For example, a local rule relating to Bankruptcy Rule 7001 will be numbered as Local Bankruptcy Rule No. 7001.1. This numbering system should facilitate the use of the local rules.

The Local Bankruptcy Rules will be cited as: "Local Bankruptcy Rule No.__, EDNC".

PART I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

RULE
1002.1 Voluntary Petition
1006.1 Filing Fees
1007.1 Lists, Schedules and Statements; Time Limits
1007.2 Bankruptcy Case Cover Sheet
1009.1 Amendment of Voluntary Petition, Lists, Schedules and Statement of Financial Affairs

PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

2003.1 Meeting of Creditors or Equity Security Holders

2015.1 Duty of Trustee or Debtor in Possession to Keep Records, Make Reports, and Give Notice of Case
2015.2 Duty of Chapter 7 Trustee to Give Notice
2016.1 Filing of Attorney Fee Disclosure Statement

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

3002.1 Filing Proof of Claim or Interest
3003.1 Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases
3003.2 Time for Filing Claims in a Chapter 11 Case
3010.1 Payments to Creditors in Chapter 13 Individual's Debt Adjustment Cases
3012.1 Valuation of Security
3017.1 Notices Required to Be Sent by Chapter 11 Debtors

PART IV. THE DEBTOR: DUTIES AND BENEFITS

4001.1 Relief from Automatic Stay; Use of Cash Collateral

RULE
4002.1 Duties of Chapter 13 Debtor
4003.1 Exemptions
4003.2 Extension of Time for Objections to Exemptions
4004.1 Notice of Discharge

PART V. BANKRUPTCY COURTS AND CLERKS

5005.1 Filing of Papers

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

["Reserved"]

PART VII. ADVERSARY PROCEEDINGS

7003.1 Commencement of an Adversary Proceeding
7004.1 Service
7041.1 Dismissal of Actions for Lack of Prosecution
7067.1 Deposit in Court

PART VIII. APPEALS TO DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL

["Reserved"]

PART IX. GENERAL PROVISIONS

9004.1 General Requirements of Form; Number of Copies of Other Documents
9007.1 Designation of Parties to Provide Notice
9010.1 Representation and Appearances; Powers of Attorney
9010.2 Extent of Attorney's Duty to Represent
9014.1 Contested Matters

Local Forms
No. 1 Bankruptcy Case Cover Sheet
No. 2 Notice of Motion and Certificate of Service
No. 3 Schedule B-4 Claim of Exemptions
No. 4 Certificate of Mailing of Order of Discharge

Part I. Commencement of Case; Proceedings Relating to Petition and Order for Relief

Rule 1002.1

Voluntary Petition

Bankruptcy Rule 1002(b)(1) is amended to read that the required number of copies of petitions requesting relief under chapters 7 and 13 of the Code is as follows:

(1) Chapter 7 — original and two copies
(2) Chapter 13 — original and three copies

Rule 1006.1

Filing Fees

(1) An application for permission to pay the filing fees in installments shall contain the following:

(a) reasons why the debtor cannot pay the full fee at the time of filing;
(b) a statement that the debtor's attorney has received no payment for fees and will accept none until the filing fees are paid in full;
(c) a statement that the debtor does not owe any outstanding fees to the Court on account of any other prior case;
(d) signature of both the debtor and the debtor's attorney.

(2) Following the filing of a petition and an application, each application will be reviewed by the Court and an order entered granting or denying the application. Should the application be denied, the debtor shall have ten (10) days from the date of the order to pay the full fee. If the full fee is not paid within ten (10) days of the order, the petition will be dismissed by the Court without any further prior notice.

(3) Final installments of the filing fee shall be paid within ten (10) days following the date first set for the meeting of creditors called pursuant to 11 U.S.C. § 341, unless otherwise ordered by the Court upon appropriate motion for extension and for cause shown.

(4) The debtor and the debtor's attorney are responsible for knowing the dates the payments are due. No reminders will be provided from the Court of the due date. Upon failure to make any payment as scheduled, the petition is subject to dismissal after hearing on notice to the debtor and trustee.

(5) In chapter 13 cases, filing fees must be paid directly to the clerk and may not be paid through the standing trustee, whether the payments are full or installments, unless otherwise ordered by the Court upon motion and for cause shown.

Rule 1007.1

Lists, Schedules and Statements; Time Limits

A petition requesting relief under chapters 7, 11 or 13 shall be accompanied by a mailing matrix containing the complete mailing address, including zip code, for the following:

(1) each debtor
(2) attorney for the debtor

(3) all creditors listed in the petition, alphabetically arranged
(4) Internal Revenue Service, 320 Federal Place, Greensboro, North Carolina 27402 (ATTN: Special Procedures Staff) — except in chapters 7 and 13 when the IRS is *not* listed as a creditor
(5) North Carolina Department of Revenue, Post Office Box 25000, Raleigh, North Carolina 27640 — except in chapters 7 and 13 when the Department of Revenue is *not* listed as a creditor
(6) Employment Security Commission, Post Office Box 25903, Raleigh, North Carolina 27611 — except in chapters 7 and 13 when the ESC is *not* listed as a creditor.
(7) If the United States is a party, other than for taxes, the matrix should include the United States Attorney, Post Office Box 26897, Raleigh, North Carolina 27611. (EXAMPLE: FHA, FmHA, VA, SBA)

The matrix shall be prepared so as to be suitably reproduced photographically on pre-gummed labels and shall be certified as accurate by the filing attorney or party. Such party shall be responsible for any errors in or omissions from the listings.

Rule 1007.2

Bankruptcy Case Cover Sheet

A petition requesting relief under chapters 7, 11 or 13 shall be accompanied by a Bankruptcy Case Cover Sheet conforming substantially to Local Form No. 1 contained in these rules, which has been completed fully by the debtor from the information contained in the schedules.

Rule 1009.1

Amendment of Voluntary Petition, Lists, Schedules and Statement of Financial Affairs

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served and certified by the person making the service. The clerk shall not accept such amendment for filing without such certificate.

Part II. Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants

Rule 2003.1

Meeting of Creditors or Equity Security Holders

The clerk shall retain and preserve the taped recordings of the meetings of creditors required by Section 341 of the Code for a period of six (6) months from the date of said meeting. After the expiration of six (6) months from said date, the clerk is authorized to erase or otherwise destroy the aforementioned taped recordings.

Rule 2015.1

Duty of Trustee or Debtor in Possession to Keep Records, Make Reports, and Give Notice of Case

The standing chapter 13 trustees are authorized to charge a two dollar ($2) search fee when answering inquiries which require a search of the records for each name or item searched in accordance with 28 U.S.C. § 1930(c), and to use the same as a part of operating expenses. Said trustees shall account to the Court for funds so collected.

Rule 2015.2

Duty of Chapter 7 Trustee to Give Notice

The chapter 7 trustees shall prepare and mail notices as follows:

(1) Notices of sale as provided in Bankruptcy Rule 6004 and setting the time for filing objections to any sale to within at least fifteen (15) days of the date of the mailing of said notice.

(2) Notice of hearing on the final account (final meeting) in a chapter 7 case if the net proceeds realized exceed $250.

The chapter 7 trustee shall prepare and file with the clerk a certificate of service showing when and to whom such notices were mailed within three (3) days thereafter.

Rule 2016.1

Filing of Attorney Fee Disclosure Statement

The disclosure of attorney compensation required by 11 U.S.C. § 329 must be filed with the Court within fifteen (15) days of the date of the filing of the original petition.

Part III. Claims and Distribution to Creditors and Equity Interest Holders; Plans

Rule 3002.1

Filing Proof of Claim or Interest

(1) In chapters 7 and 11 cases, all claims shall be filed with the clerk in accordance with Bankruptcy Rule 5005.

(2) In chapter 13 cases, all claims shall be filed with the standing chapter 13 trustee as provided in Local Bankruptcy Rule No. 5005.1, EDNC.

Rule 3003.1

Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases

The debtor shall notify each creditor whose claim is listed in the petition as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the schedule of assets and liabilities or within fifteen (15) days after addition of such creditors to the petition. Failure to notify a creditor that its claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor. The debtor shall file a certificate of service with the Court within three (3) days after service has been made.

Rule 3003.2

Time for Filing Claims in a Chapter 11 Case

In a chapter 11 case, a proof of claim shall be filed within ninety (90) days after the date first set for the meeting of creditors called pursuant to 11 U.S.C. § 341(a) of the Code, except as otherwise extended by order of the Court.

Rule 3010.1

Payments to Creditors in Chapter 13 Individual's Debt Adjustment Cases

Bankruptcy Rule 3010(b) is amended to the extent that standing chapter 13 trustees are authorized to make payments to creditors in amounts smaller than $15 without waiting until that creditor's dividends accumulate to $15. The decision as to whether to make smaller payments shall be solely in the discretion of the trustee as to what is in the best interest of the individual estate.

Rule 3012.1

Valuation of Security

After notice, a chapter 13 trustee may determine the value of a creditor's security at the 341 meeting and, unless an objection is filed within ten (10) days after notice of such valuation, the Court may accept the valuation for the purpose of distribution under the plan.

Rule 3017.1

Notices Required to Be Sent by Chapter 11 Debtors

The debtor in possession in chapter 11 cases shall be responsible for mailing the following notices and documents to creditors, after having their form and content approved by the clerk, and for filing a certificate of mailing with the clerk within three (3) days of the date of the mailing:

(1) notice of the meeting of creditors
(2) notice of the hearing on disclosure statement
(3) the plan, approved disclosure statement and notice regarding balloting and date for hearing on confirmation
(4) any other notices as the Court or clerk shall direct in a particular matter.

Part IV. The Debtor: Duties and Benefits

Rule 4001.1

Relief From Automatic Stay; Use of Cash Collateral

The automatic stay as provided in 11 U.S.C. § 362(a) is modified in bankruptcy cases as follows:

(1) In chapters 7 and 13 cases, the Internal Revenue Service is authorized:
  (a) to make income tax refunds, in the ordinary course of business, directly to chapter 7 and 13 debtors unless otherwise ordered by the Court or otherwise instructed by the chapter 7 trustee or the standing chapter 13 trustee;
  (b) to offset against any refund due a debtor any taxes due the United States government;
  (c) to assess any tax liability satisfied by offsetting any refunds, when such liability has not been assessed previously;
  (d) to assess tax liabilities shown on voluntarily filed returns and other agreed-to liabilities.
(2) In chapter 13 cases, affected secured creditors may:
  (a) contact the debtor about the status of insurance coverage on property used as collateral;
  (b) if paid outside the plan, contact the debtor about any payment in default.
(3) In chapter 13 cases, if the collision insurance coverage on a vehicle less than seven (7) years old on which there is a lien lapses and the debtor fails to obtain coverage and furnish evidence to the lienholder within ten (10) days thereafter, the automatic stay as to that lienholder shall be lifted.
(4) In chapter 7 cases, the abandonment of property pursuant to 11 U.S.C. § 554 shall have the effect of lifting the automatic stay with respect to the property abandoned as to the estate and as to the debtor.

Rule 4002.1

Duties of Chapter 13 Debtor

The debtor filing a petition requesting relief under chapter 13 of the Code shall comply with the following:

(1) The debtor shall begin making the payments called for in the proposed plan on the first day of the first month following the month in which the chapter 13 case is filed. Said payments shall be made directly to the standing chapter 13 trustee.
(2) If secured claims are to be paid outside of the plan, the debtor must continue to make the regular scheduled payments to the secured creditor prior to confirmation.

(3) The debtor shall maintain collision insurance on any vehicle less than seven (7) years old on which there is a lien. Failure to keep such insurance in force shall result in the lifting of the automatic stay as provided in Local Bankruptcy Rule No. 4001.1(3), EDNC.
(4) The debtor shall not dispose of any property by sale or otherwise without prior approval of the trustee and an order of the Court.
(5) The debtor shall not purchase additional property or incur additional indebtedness for an amount in excess of five hundred dollars ($500) without prior approval of the trustee and an order of the Court.
(6) When a case is dismissed prior to confirmation, the Court may require the debtor to provide adequate protection to one or more secured creditors by directing the chapter 13 trustee to make adequate protection payments from funds received under paragraph (1) of this rule.

Rule 4003.1

Exemptions

Except in unusual circumstances, each debtor, who is an individual, in a bankruptcy case shall file a claim for exempt property pursuant to Section 522(b)(1) of the Code, if at all, on Local Form No. 3, which form is available from the clerk; the debtor's filing of Local Form No. 3 must be referenced in Schedule B-4 of the debtor's schedules.

Rule 4003.2

Extension of Time for Objections to Exemptions

The Court may grant any party in interest an extension of time for objecting to the debtor's claim of exempt property. The request for extension shall be by motion which shall contain the reasons for requesting the extension. The motion must be filed before the time for objecting expires.

Rule 4004.1

Notice of Discharge

The attorney for the chapter 7 debtor shall promptly mail a copy of the final order of discharge to the persons specified in subdivision (a) of Bankruptcy Rule 4004, and shall file a certification that a copy of the order of discharge has been mailed and shown when and to whom the order was sent within three (3) days thereafter. Such certification shall conform substantially to Local Form No. 4 in these rules.

Part V. Bankruptcy Courts and Clerks

Rule 5005.1

Filing of Papers

(1) In chapter 13 cases, proofs of claim shall be filed directly with the standing chapter 13 trustee to whom the case is assigned. The address of the proper standing trustee will be shown on the notice of the meeting of creditors. Claims will be dated and stamped as "received" as of the date they arrive in

the office of the trustee, and the claim shall be deemed filed with the Court as of that date.

The staff of the standing chapter 13 trustee shall prepare a claims register for each case referred to that trustee and such claims register shall be transferred to the clerk and made a part of the permanent record at the closing of the case, together with the original claims.

(2) All pleadings (including but not limited to complaints, answers, motions and applications), and all proposed orders, shall be tendered by the party submitting such documents to the clerk, rather than directly to the judge unless otherwise specifically directed. The clerk shall first accomplish any necessary processing of such document before such document is forwarded to any judge of this Court for consideration.

Part VI. Collection and Liquidation of the Estate

Reserved

Part VII. Adversary Proceedings

Rule 7003.1

Commencement of an Adversary Proceeding

All complaints initiating adversary proceedings in bankruptcy cases shall be accompanied by a fully completed Bankruptcy Cover Sheet (Form BC-104) containing the complete information as listed therein.

Rule 7004.1

Service

Any and all filings (except claims) in all proceedings and cases under the Code must be served on the trustee (including the standing chapter 13 trustee) for the debtor whether or not such trustee is a party to the proceeding. In chapter 11 cases, the attorney for the debtor-in-possession is to be served in like manner.

Rule 7041.1

Dismissal of Actions for Lack of Prosecution

Except where a complaint objecting to a discharge has been filed, an adversary proceeding may be dismissed by the Court for lack of prosecution as follows:

(1) where no service of process has been made and certified to the Court within thirty (30) days after filing of the complaint; or

(2) where no responsive pleadings have been filed and plaintiff has not moved for entry of default within thirty (30) days after the time for filing responsive pleadings has expired.

Dismissal under this local rule shall be without prejudice unless the delay has resulted in prejudice to an opposing party.

Rule 7067.1

Deposit in Court

In the event that a depository intended by the Court to receive registry funds is not able, immediately upon the Court's receipt of the registry funds, to pledge sufficient collateral for receipt of those funds, such funds may be retained temporarily in non-interest bearing U.S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

Part VIII. Appeals to District Court or Bankruptcy Appellate Panel

Reserved

Part IX. General Provisions

Rule 9004.1

General Requirements of Form; Number of Copies of Other Documents

The number of documents required other than those provided for in the Bankruptcy Rules or Local Bankruptcy Rules is as follows:

(1) Monthly operating report of debtor-in-possession and operating trustee . . . . . original plus two

(2) Any person requesting filed copies of documents for his office records must submit copies in addition to those called for in the Bankruptcy Rules or Local Bankruptcy Rules, together with a stamped, self-addressed envelope.

(3) Any order or judgment that is tendered to the Court for consideration shall have attached a sufficient number of copies for service on all parties required to receive notice of such order or judgment. Orders tendered without sufficient copies may not be considered until such time as the required number of copies has been tendered

(4) Applications for compensation

. . . . . original plus two

(5) Motions, applications, answers, responses and other general pleadings . . . . . original plus two

Rule 9007.1

Designation of Parties to Provide Notice

The clerk is authorized to designate the parties who shall provide such notice to creditors and parties in interest as required under the Bankruptcy Rules and the Local Bankruptcy Rules.

Rule 9010.1

Representation and Appearances; Powers of Attorney

Local Rule No. 2.00, entitled "Attorneys", of the Local Rules for the United States District Court, Eastern District of North Carolina, is applicable in this Court, with the following exceptions:

(1) an individual may represent himself;

(2) an entity may be represented at a meeting of creditors by its officers and agents; however, all courtroom appearances, except as previously indicated, pleadings, motions, and objections must be by an attorney admitted to practice before this Court.

Rule 9010.2

Extent of an Attorney's Duty to Represent

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved upon application and Court order. In the event additional fees are required, they must be applied for pursuant to Bankruptcy Rule 2016.

Rule 9014.1

Contested Matters

(1) *Requirements of Motion.* A motion shall be accompanied by all exhibits and attachments referred to in the motion, together with a notice of motion and certification of service. The notice of motion shall give notice of the filing of the motion, allow for a specific response time to the motion and shall conform substantially to Local Form No. 2 in these rules.

(2) *Time for Response.* A response and accompanying affidavits, if any, to any motion shall be filed within fifteen (15) days from the date of the notice of motion, unless otherwise ordered or provided in the Bankruptcy Rules or Local Bankruptcy Rules.

(3) *Service of Motion.* The moving party shall serve copies of the motion, together with all exhibits and attachments referred to therein, accompanied by a notice of motion in the manner prescribed in Bankruptcy Rule 7004, contemporaneously with the filing of the original motion and notice with the clerk, and shall attach a certificate of service to the original motion and notice to be filed with the clerk. Any motion received for filing with the clerk which is not accompanied by an appropriate notice and certificate of service shall not be accepted for filing by the clerk, but shall be returned to the moving party without action.

(4) *Response.* Any party against whom relief is sought may file a written response to the motion. The response may be accompanied by affidavits and other supporting documents and shall be served on all interested parties and service shall be certified to the Court.

(5) *Hearing on Motion.* Unless a hearing is requested in the motion or in the response thereto, motions may be determined without a hearing. A hearing on a motion may be ordered by the Court in its discretion.

(6) *Frivolous or Delaying Motions.* Where the Court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion. Any party filing a request for a hearing shall appear at the hearing set by the Court in support of such request or costs may be assessed.

LOCAL FORMS

Local Form #1
Rev. 9/83

BANKRUPTCY CASE COVER SHEET

CAPTION OF PETITION: (See Bankruptcy Rule 1005)

LAST NAME FIRST NAME MIDDLE NAME Social Security Number

SPOUSE IF JOINT PETITION:

LAST NAME FIRST NAME MIDDLE NAME Social Security Number

IF THE DEBTOR IS A CORPORATION OR PARTNERSHIP OR OTHER ENTITY WHICH USES AN EMPLOYER'S IDENTIFICATION NUMBER, REFLECT NUMBER HERE _____

ADDRESS OF DEBTOR:

Street Number, P. O. Box, City, State and ZIP CODE

County in Which Debtor Resides

County Code (See Reverse Side)

ATTORNEY FOR DEBTOR:

NAME:
ADDRESS:
CITY, STATE & ZIP:
TELEPHONE NUMBER: ( )

CHECK ONE:
___ Joint Petition (husband & wife)
___ Individual Petition
___ Partnership
___ Corporation

CHECK ONE:
___ Voluntary
___ Involuntary

CHECK ONE:
___ Business
___ Non-Business

CASE COMMENCED UNDER: (check one)
____ CHAPTER 7
____ CHAPTER 7 - Stockbroker
____ CHAPTER 7 - Commodity Broker
____ CHAPTER 9
____ CHAPTER 11 Reorganization
____ CHAPTER 11 - Railroad
____ CHAPTER 13
____ SECTION 304

IF THE DEBTOR IS NOT REPRESENTED BY AN ATTORNEY, LIST HOME AND BUSINESS TELEPHONE NUMBERS:
HOME:_____ WORK:_____

COMPLETE THE FOLLOWING BLOCKS FROM INFORMATION CONTAINED IN THE SCHEDULES OF THE DEBTOR

(Round off to nearest dollar)
OBLIGATIONS OF DEBTOR AS SCHEDULED FOR ALL CHAPTERS (7, 11 and 13)

Priority Debts	$	.00
Secured Debts	$	.00
Unsecured Debts	$	.00
Total Assets of Debtor as Shown in Schedules B-1 thru B-3	$	.00
Total Number of Creditors Listed on Schedules A-1 thru A-3		
Total value of property claimed as exempt in Schedule B-4	$	.00

CHECK APPROPRIATE BOX:

☐ Filing Fees Paid in Full at Time of Filing

OR

☐ Filing Fees to be Paid in Installments (Application filed with petition)

NOTE: File original and one copy with the Clerk

NORTH CAROLINA

Number of counties, 100

Alamance	37001	Forsyth	37067	Onslow	37133
Alexander	37003	Franklin	37069	Orange	37135
Alleghany	37005	Gaston	37071	Pamlico	37137
Anson	37007	Gates	37073	Pasquotank	37139
Ashe	37009	Graham	37075	Pender	37141
Avery	37011	Granville	37077	Perquimans	37143
Beaufort	37013	Greene	37079	Person	37145
Bertie	37015	Guilford	37081	Pitt	37147
Bladen	37017	Halifax	37083	Polk	37149
Brunswick	37019	Harnett	37085	Randolph	37151
Buncombe	37021	Haywood	37087	Richmond	37153
Burke	37023	Henderson	37089	Robeson	37155
Cabarrus	37025	Hertford	37091	Rockingham	37157
Caldwell	37027	Hoke	37093	Rowan	37159
Camden	37029	Hyde	37095	Rutherford	37161
Carteret	37031	Iredell	37097	Sampson	37163
Caswell	37033	Jackson	37099	Scotland	37165
Catawba	37035	Johnston	37101	Stanly	37167
Chatham	37037	Jones	37103	Stokes	37169
Cherokee	37039	Lee	37105	Surry	37171
Chowan	37041	Lenoir	37107	Swain	37173
Clay	37043	Lincoln	37109	Transylvania	37175
Cleveland	37045	McDowell	37111	Tyrrell	37177
Columbus	37047	Macon	37113	Union	37179
Craven	37049	Madison	37115	Vance	37181
Cumberland	37051	Martin	37117	Wake	37183
Currituck	37053	Mecklenburg	37119	Warren	37185
Dare	37055	Mitchell	37121	Washington	37187
Davidson	37057	Montgomery	37123	Watauga	37189
Davie	37059	Moore	37125	Wayne	37191
Duplin	37061	Nash	37127	Wilkes	37193
Durham	37063	New Hanover	37129	Wilson	37195
Edgecombe	37065	Northampton	37131	Yadkin	37197
				Yancey	37199

Local Form #2
Rev. 11/83

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:

CASE NO.:
SS#
ID#
CHAPTER:

DEBTOR(S)

NOTICE OF MOTION
AND
CERTIFICATE OF SERVICE

TO: THE DEBTOR(S), ATTORNEY FOR THE DEBTOR(S), TRUSTEE AND OTHER PARTIES IN INTEREST

NOTICE IS HEREBY GIVEN of the Motion to (nature of motion) filed simultaneously herewith by (moving party) in the above captioned case; and

FURTHER NOTICE IS HEREBY GIVEN that if you fail to respond or otherwise plead or request a hearing in writing within _____ days from the date of this notice, the relief requested in the motion may be granted without further hearing or notice; and

FURTHER NOTICE IS HEREBY GIVEN that if a response and a request for a hearing is filed by the debtor(s), trustee, or other parties in interest named herein in writing within the time indicated, a hearing will be conducted on the motion and response thereto at a date, time and place to be later set by this Court and all interested parties will be notified accordingly.

DATE OF NOTICE: (must be same date of service)

_____
(Movant's Name and Address)

CERTIFICATION OF SERVICE

I, _____, of _____
_____certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on the _____day of_____, 19____, I served copies of the foregoing motion and notice of motion on [include address(es)]

by (describe here the mode of service)

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____
Date Signature

Local Form #3

Page 1 of 4

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF: CASE NUMBER:

SCHEDULE B-4 CLAIM OF EXEMPTIONS

I, _____, claim the following property as exempt pursuant to 11 USC 522(b)(2)(A) and (B) and the laws of the State of North Carolina, and non-bankruptcy Federal Law:

1. NCGS 1C-1601(a)(1) (NC Const., Article X, Section 2) REAL OR PERSONAL PROPERTY USED AS A RESIDENCE OR BURIAL PLOT (exemption not to exceed $7,500.00)

Description of Property & Address	Market Value	Mtg. Holder or Lien Holder	Amt. Mtg. or Lien	Net Value

VALUE OF REAL ESTATE CLAIMED AS EXEMPT: $ .00

2. NCGS 1C-1601(a)(3) MOTOR VEHICLE (exemption in one vehicle not to exceed $1,000.00)

Model, Year Style of Auto	Market Value	Lien Holder	Amt. Lien	Net Value

VALUE OF MOTOR VEHICLE CLAIMED AS EXEMPT: $ .00

3. NCGS 1C-1601(a)(4) (NC Const., Article X, Section 1) PERSONAL OR HOUSEHOLD GOODS (net value not to exceed $2,500.00 plus $500.00 for first four dependents.)

The number of dependents for exemption purposes is: _____

Description of Property	Market Value	Lien Holder	Amt. Lien	Net Value
Clothing & Personal				
Kitchen Appliances				
Stove				
Refrigerator				
Freezer				
Washing Machine				
Dryer				
China				

Silver				
Jewelry				
Living Rm. Furn.				
Den Furn.				
Bedroom Furn				
Dining Rm. Furn.				
Lawn Furn.				
Television				
( )Stereo ( )Radio				
Musical Instruments				
( )Piano ( )Organ				
Air Conditioner				
Paintings/Art				
Lawn Mower				
Yard Tools				
Crops				
Recreational Equip.				

VALUE CLAIMED AS EXEMPT: $ .00

4. NCGS 1C-1601(a)(5) TOOLS OF TRADE (total net value not to exceed $500.00 in value)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

VALUE CLAIMED AS EXEMPT: $ .00

5. NCGS 1C-1601(a)(6) LIFE INSURANCE (NC Const., Article X, Section 5)

Company	Insured	Policy Number	Beneficiary	Cash Value

6. NCGS 1C-1601(a)(7) PROFESSIONALLY PRESCRIBED HEALTH AIDS (Debtor or Debtor's Dependents, no limit on value)

Description

7. NCGS 1C-1601(a)(8) COMPENSATION FOR PERSONAL INJURY OR DEATH OF A PERSON UPON WHOM THE DEBTOR WAS DEPENDENT FOR SUPPORT. COMPENSATION NOT EXEMPT FROM RELATED LEGAL, HEALTH OR FUNERAL EXPENSE.

8. NCGS 1C-1601(a)(2) ANY PROPERTY (total net value not to exceed $2,500.00 less any amount used under NCGS 1C-1601(1) and after reduction for overages in categories 2, 3, and 4.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

9. TENANCY BY THE ENTIRETY. The following property is claimed as exempt pursuant to 11 USC 522(b)(2)(B) and the law of the State of North Carolina pertaining to property held as tenants by the entirety.

Description of Property & Address	Market Value	Lien Holder	Amt. Lien	Net Value

VALUE OF ENTIRETIES PROPERTY CLAIMED AS EXEMPT: $ .00

10. OTHER EXEMPTIONS CLAIMED UNDER LAWS OF THE STATE OF NORTH CAROLINA

	Amount
a. Aid to the Aged, Disabled and Families with Dependent Children NCGS 108A-36	
b. Aid to the Blind NCGS 111-18	
c. Yearly Allowance for Surviving Spouse NCGS 30-15, NCGS 30-33	
d. North Carolina Local Government Employees Retirement benefits NCGS 128-31	
e. North Carolina Teachers and State Employees Retirement benefits NCGS 135-9	
f. Firemen's Relief Fund pensions NCGS 118-49	
g. Fraternal Benefit Society benefits NCGS 58-283	
h. Workers Compensation benefits NCGS 97-21	
i. Unemployment benefits, so long as not comingled and except for debts for necessities purchased while unemployed NCGS 96-17	
j. Group insurance proceeds NCGS 58-213	
k. Partnership property, except on a claim against the partnership NCGS 59-55	
l. Wages of debtor necessary for support of family NCGS 1-362	

TOTAL PROPERTY CLAIMED AS EXEMPT: $ .00

11. EXEMPTIONS CLAIMED UNDER NON-BANKRUPTCY FEDERAL LAW

	Amount
a. Foreign Service Retirement and Disability Payments 22 USC 1104	
b. Social Security benefits 42 USC 407	
c. Injury or death compensation payments from war risk hazards 42 USC 1717	
d. Wages of fishermen, seamen, and apprentices 46 USC 601	
e. Civil Service Retirement benefits 5 USC 729, 2265	

f. Longshoremen and Harbor Workers Compensation Act death and disability benefits 33 USC 916 _____
g. Railroad Retirement Act annuities and pensions 45 USC 228(L) _____
h. Veterans benefits 45 USC 352(E) _____
i. Special pension paid to winners of Congressional Medal of Honor 38 USC 3101 _____
j. Federal homestead lands, on debts contracted before the issuance of the patent 43 USC 175 _____

VALUE OF PROPERTY CLAIMED AS EXEMPT: $ .00

12. The following tangible personal property was purchased by the debtor within 90 days of the filing of the bankruptcy petition:

Description	Market Value	Lien Holder	Amt. Lien	Net Value

13. The debtor's property is subject to the following claims:

a. Of the United States or its agencies as provided by federal law
b. Of the State of North Carolina or its subdivisions for taxes or appearance bonds
c. Of a lien by a laborer
d. Of a lien by a mechanic
e. For payment of obligations contracted for the purchase of specific property
f. For repair or improvement of specific property
g. For contractual security interests in specific property, except debtor's household goods on which there exists a nonpossessory, nonpurchase money security interest
h. For statutory liens, other than judicial liens
i. For child support or alimony, ordered pursuant to Chapter 50 of the General Statutes of North Carolina

Claimant	Nature of Claim	Amt. of Claim	Description of Property	Value of Property	Net Value

None of the property listed in paragraph 12 has been included in this claim of exemptions.

None of the claims listed in paragraph 13 is subject to this claim of exemptions.

DATE: _____
DEBTOR

LOCAL FORM #4

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NORTH CAROLINA

IN RE: CASE NUMBER:

DEBTOR

CERTIFICATE OF MAILING
OF
ORDER OF DISCHARGE

I,

of**

certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on _____, 19__, I served a copy of the order of discharge of debtor on each of the debtor's creditors named in the schedules or list of creditors filed herein or as otherwise appearing in the files in this case, except where the address is unknown, by enclosing the copy of the order in a sealed, postage pre-paid envelope bearing the name and address of each creditor as shown in the record in this case.

That the envelope containing such copy of the order was deposited by me in a regular United States Mail Box in the City of _____ _____, in said District on the _____ day of _____, 19__.

DATED:

_____
Attorney for the Debtor

**Include Post Office Address

(3A) United States Bankruptcy Court for the Western District of North Carolina

Rules of Court

Adopted June 15, 1984.

GENERAL PRACTICE PROVISIONS (1-14)

Rule
1. Persons Who May Practice Before the Bankruptcy Court.
2. Required Matrix and Number of Copies of Petition and Other Documents.
3. Required Number of Copies of Orders or Judgments Tendered to the Court.
4. Extent of an Attorney's Duty to Represent.
5. Retention of Tapes of 341(a) Meeting for Six Months and Requests for Transcripts of Tapes.
6. Routing of Documents through Clerk's Office.
7. Registry Accounts.
8. Designation of Parties to Provide Notice.
9. Business Hours of the Court and Access to Court Records.
10. Petition and Accompanying Documents.
11. Need of Attention or Protection.
12. Exhibits.
13. Orders, Findings, Conclusions.
14. Costs.

CHAPTER 7 (15-19)

15. Time Limit for Amending or Objecting to Exemption Election.
16. Filing of Attorney Fee Disclosure Statement.
17. Final Hearings on Requests for Relief from Stay.
18. Certificate of Service Required for Amendment to Petitions, Schedules or Statements and Claim of Exemptions.

Rule
19. Duty of Chapter 7 Trustee to Give Notice.

CHAPTER 11 (20-22)

20. Chapter 11 Interim Fee Procedure.
21. Notices Required to be Sent by Chapter 11 Debtors.
22. Chapter 11 Claims.

CHAPTER 13 (23-31)

23. Requirements for Payment of Filing Fees in Installments.
24. Payments to Creditors in Chapter 13 Individual's Debt Adjustment Cases.
25. Filing of Claims in Chapter 13 Proceedings.
26. Procedure for Objecting to or Confirming Chapter 13 Plans.
27. Income Tax Refunds.
28. Search Fee Charged by Chapter 13 Trustee.
29. Trustee Valuation of Creditor's Security.
30. Secured Creditor Contact with Chapter 13 Debtor.
31. Chapter 13 Attorney Fee Procedure.

ADVERSARY PROCEEDINGS (32 to 35)

32. Service on Parties.
33. Motion Practice for Relief from Stay and Avoidance of Liens.
34. Adversary Proceeding Cover Sheet Required.
35. Dismissal of Adversary Proceedings for Lack of Prosecution.

GENERAL PROVISIONS

RULE NO. 1

PERSONS WHO MAY PRACTICE BEFORE THE BANKRUPTCY COURT

(a) Those persons who are admitted to practice before the United States District Court for the Western District of North Carolina will be allowed to practice law before this Court. For purposes of this Rule, "practice of law"

includes, but is not limited to, preparing complaints, preparing petitions, preparing applications, preparing motions, questioning witnesses in proceedings before the Judge, and pursuing any action of any nature in this Court (but does not include questioning debtors at a meeting of creditors or at other administrative hearings). All businesses, (other than a sole proprietorship), partnerships, and corporations that desire to appear in proceedings before this Court must be represented by a lawyer duly admitted to practice before this Court. Otherwise licensed attorneys may be permitted by the Court to appear on an ad hoc basis.

The following exceptions shall apply:

1. An individual may represent himself.
2. An individual may represent a non-incorporated business if said individual is the sole proprietor of said business.
3. An individual may represent himself or any other entity at a meeting of creditors; however, any objection, motion, or application that must be formally pursued before the Court, although raised at a meeting of creditors, must be pursued by an attorney permitted to practice before this Court.

RULE NO. 2

REQUIRED MATRIX AND NUMBER OF COPIES OF PETITION AND OTHER DOCUMENTS

I. Required number of copies of petitions and attached lists, schedules, statements, claims of exemption and subsequent amendments thereto:
   (a) Chapter 7 or Chapter 13: The original document plus three copies
   (b) Chapter 9 or Chapter 11: The original document plus five copies.

II. Monthly Financial Reports for Debtors and Operating Trustees
   (a) The original document plus two copies must be filed.

III. Copies stamped FILED
   (a) Any person requesting filed copies of documents for their office records must submit copies in addition to those required in I and II above along with a stamped, self-addressed envelope.

IV. Requirement of Master Mailing Matrix
   (a) As a requirement of filing, all bankruptcy petitions must be accompanied by an alphabetized matrix containing the names and addresses of all parties in interest, including the debtor, debtor's attorney, creditors and appropriate governmental agencies.
   (b) The matrix shall be prepared according to the forms and instructions provided upon request by the Clerk's office.
   (c) The matrix shall be certified as clerically accurate by the filing attorney or party and such party shall be responsible for any errors in or omissions from the listings.
   (d) In Chapter 13 cases, creditors or contingent creditors to whom notice is intended to be sent must be listed on the Schedule of Creditors as well as on the matrix.

RULE NO. 3

REQUIRED NUMBER OF COPIES OF ORDERS OR JUDGMENTS TENDERED TO THE COURT

Any order or judgment that is tendered to the Court for consideration shall have attached a sufficient number of copies for service on all parties required to receive notice of such order or judgment. Orders tendered without sufficient copies will not be considered until such time as the required copies are also tendered.

RULE NO. 4

EXTENT OF AN ATTORNEY'S DUTY TO REPRESENT

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved upon application and Court order. In the event additional fees are required, they will be applied for in accordance with Rule 2016.

RULE NO. 5

RETENTION OF TAPES OF 341(a) MEETING FOR SIX MONTHS AND REQUESTS FOR TRANSCRIPTS OF TAPES

I. Retention of Tapes

(a) The Clerk shall retain and preserve the taped recordings of the meetings of creditors required by 341(a) of the Bankruptcy Code for a period of six (6) months from the date of said meeting. After the expiration of six (6) months from said date, the Clerk is authorized to erase or otherwise destroy the aforementioned taped recordings, unless otherwise ordered by the Court.

II. Transcripts of 341(a) Meeting Tapes.

(a) Any party wishing a transcript of a 341(a) meeting tape must contact the Contract Court Reporter for the Court and order the transcript. The ordering party must then contact the Clerk's Office and request that the Clerk deliver the tape to the Court Reporter for transcribing. All fees will be paid directly to the Court Reporter by the ordering party in accordance with the transcript fee schedule adopted by the Judicial Conference.

RULE NO. 6

ROUTING OF DOCUMENTS THROUGH CLERK'S OFFICE

All pleadings (including, but not limited to, complaints, answers, motions and applications), and all prepared orders, shall be tendered by the party submitting such document to the Clerk's Office, rather than directly to the

Judge, and the Clerk's Office shall first accomplish any necessary processing of such document, before such document is forwarded to the Judge of this Court for consideration.

RULE NO. 7

REGISTRY ACCOUNTS

In the event that a depository intended by the Court to receive registry funds is not, immediately upon the Court's receipt of the registry funds, able to pledge sufficient collateral for receipt of those funds, such funds may be retained temporarily in non-interest-bearing U.S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

RULE NO. 8

DESIGNATION OF PARTIES TO PROVIDE NOTICE

The Clerk of this Court is authorized to designate the parties who shall provide such notice to creditors and parties-in-interest as required under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of Court.

RULE NO. 9

BUSINESS HOURS OF THE COURT AND ACCESS TO COURT RECORDS

(A) Business Hours of the Court

The Business Hours of the Office of the Clerk of the United States Bankruptcy Court for the Western District of North Carolina will be from 8:30 A.M. to 4:30 P.M. all days except Saturday, Sunday and legal holidays.

(B) Court Records

All records of the Court shall remain in the custody of the Clerk, subject to examination by the public without charge. The Clerk may require a written receipt from parties reviewing a file. No record shall be taken from the Clerk's Office without an Order of the Court allowing such removal and no such Order shall issue except for good cause.

RULE NO. 10

PETITION AND ACCOMPANYING DOCUMENTS

(A) Style of Petition

The name of the debtor in the caption of a Petition shall be styled as follows if the debtor is an individual: "Thomas E. Jones, a single person," if the debtor is not married; or "Thomas E. Jones, married". If the debtor is a general partnership, the words "a general partnership" shall follow the name. If the debtor is a limited partnership, the words "a limited partnership" shall follow the name. If the debtor is a corporation, the words "a corporation" shall follow the name unless "Inc.," "Incorporated," or "Corporation" is part of the name.

(B) Other Names

Immediately after the debtor's name in the caption of the Petition, the petitioners shall list all names, assumed names, trade names, or designations by or under which the debtor has been known or conducted any business within the six (6) years preceding the filing of the Petition.

(C) Debtor Engaged in Business

Where any debts scheduled were incurred while the debtor was engaged in business, even though he is not so engaged at the time of filing of the Petition, the Statement of Affairs for a debtor engaged in business shall be filed.

(D) Petition Filed by a Corporation

When a Voluntary Petition is filed by a corporation, there shall be attached to the Petition as an Exhibit the original or a Certified Copy of the Resolution of the Petitioner's Board of Directors authorizing the filing of the Petition. The corporation shall be represented by an attorney and the attorney shall sign the Petition.

(E) Petition Filed by a Partnership

When a Voluntary Petition is filed by a partnership

(1) All general partners shall verify the petition; or

(2) At least one general partner shall verify the Petition. If fewer than all general partners verify the Petition, there shall be attached to the Petition as an Exhibit the original or a Certified Copy of a document evidencing the consent of all general partners to the Petition.

(F) Character of Assets and Liabilities

All assets and liabilities scheduled by married debtors shall be considered to be scheduled as joint in character unless the debtor indicates otherwise.

(G) No Blank Items

Each item in the Schedules and Statement of Affairs not otherwise filled out, shall be completed by the entry "none" or "not applicable," as appropriate.

(H) Refusal to File Petition

The Clerk need not accept for filing a Voluntary Petition which is not accompanied by a matrix, cover sheet, filing fee, and corporate or partnership resolution, as applicable. A Voluntary Chapter 11 Petition need not be accepted unless accompanied, in addition to the foregoing, by a list of the twenty (20) largest unsecured creditors. Acceptance of a Petition for filing does not operate as a waiver of any of the provisions of this rule.

RULE NO. 11

NEED OF ATTENTION OR PROTECTION

(A) Inventory or Equipment

When a stock of goods or business equipment is scheduled, the debtor shall, immediately after the general description thereof, list a present inventory, append a brief explanation of its exact location, the name and address of the custodian thereof, the protection being given such property, and the amount and duration of fire and theft insurance, if any, and state whether prompt additional attention or protection is necessary.

(B) Need for Immediate Action

If a stock of goods includes perishables or if property or the business premises otherwise need immediate attention or protection, the debtor or his attorney, when relief is ordered, shall so notify the Court and the Trustee, if one has been appointed, of the need for immediate action. Notification shall be by personal communication or by telephone.

RULE NO. 12

EXHIBITS

The Clerk may destroy upon notice or return all Exhibits to the parties offering them after the time for appeal has passed.

RULE NO. 13

ORDERS, FINDINGS, CONCLUSIONS

(A) Preparation

All orders, findings of fact and conclusions of law, judgments, and decrees, unless otherwise directed by the Court, and required to be in writing, and when not entered by the Clerk as provided in Rule 58, Federal Rules of Civil Procedure, shall be prepared by the attorney obtaining such order, judgment or decree, or representing the successful party. The original order, findings of fact and conclusions of law, judgment or decree shall be delivered to the Clerk after one (1) copy has been served on any party who opposed the order and any party (by their counsel, if they were represented) who participated in a hearing from which the order arose. A cover letter shall be attached to the tendered order in which the tendering attorney shall notify the Clerk of the date on which, and the parties on whom, such copies were served. The Court may then enter such order, findings and conclusions, judgment or decree and the opposing party, if not satisfied with the same, may move for amendment or alteration thereof or addition thereto in accordance with Rule 52(b) or 59(e), Federal Rules of Civil Procedure.

(B) Time of Presentation

Any party directed to prepare an order, findings of fact and conclusions of law, judgment or decree either by (a) above or by specific direction of the Court shall prepare and present such order to the Clerk within ten (10) days of the Court announcing its decision unless the party responsible for preparing such order has applied for and received from the Court a specific extension for cause.

(C) Every judgment or order in a contested matter or adversary proceeding shall be set forth on a separate document from the motion or other request for the order, and shall set forth with particularity the terms of the order.

(D) Signature of the Court

A document requiring the signature of the Court shall be prepared as follows:

DATED this _____ day of _____, 19____.

_____

BANKRUPTCY JUDGE

RULE NO. 14

COSTS

(A) Cost Bill

A party allowed costs may, within ten (10) days after entry of judgment, file and serve on the attorney for the opposing party a bill of costs. (BK 97). The bill shall state the time that the costs thereon will be taxed, which time shall be no less than one day from the date the bill is served on the opposing party. With the bill shall be filed a certification that the opposing party was served.

(B) Objection and Hearing

Before the costs are taxed, a party objecting to any costs contained in the bill shall file his objection in writing specifying the ground of his objection. The Clerk of Court will hear the objection.

(C) Taxation

After the hearing, or, if no objection is filed, on the date stated in the cost bill, the Clerk may enter an order taxing the costs. The taxation of costs made by the Clerk shall be final unless modified on appeal as provided in subdivision (d).

(D) Appeal

A party may appeal the decision of the Clerk in the taxation of costs by filing a motion to retax with the Court within five (5) days of the taxation by the Clerk. The party appealing shall give notice and opportunity for a hearing to the opposing party. The motion will be heard upon the same papers and evidence used before the Clerk.

CHAPTER 7 PROVISIONS (15-19)

RULE NO. 15

TIME LIMIT FOR AMENDING OR OBJECTING TO EXEMPTION ELECTION

I. The debtor shall have up to and including the first day first set for the § 341(a) meeting of creditors in which to amend his exemption election, after which the exemption election shall be final as against the debtor; provided, however, that the trustee and any party in interest shall have up to and including the thirtieth (30th) day following the 341(a) meeting of creditors in which to object to the debtor's exemption election.

II. Any amendments or objections to exemption elections other than as allowed in (I.) shall be with leave of Court only.

RULE NO. 16

FILING OF ATTORNEY FEE DISCLOSURE STATEMENT

The disclosure of attorney compensation required by 11 U.S.C. Section 329 must be filed with the Court within fifteen (15) days of the date the original petition is filed.

Court Comment. — This supplements Rule 2016(b).

RULE NO. 17

FINAL HEARINGS ON REQUESTS FOR RELIEF FROM STAY

The first scheduled hearing on a request for relief from stay shall be deemed to be the final hearing and all parties are to be prepared for trial at such time unless either party notifies the opposite party and the Court at least 24 hours in advance of the hearing that they wish the hearing treated as a preliminary

hearing. Should such occur, at the preliminary hearing, the date for final hearing shall be set.

Court Comment. — This supplements Rule 4001(b).

RULE NO. 18

CERTIFICATE OF SERVICE REQUIRED FOR AMENDMENT TO PETITIONS, SCHEDULES OR STATEMENTS AND CLAIM OF EXEMPTIONS

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served, certified by the person who made the service.

Court Comment. — This supplements Rule 1009.

RULE NO. 19

DUTY OF CHAPTER 7 TRUSTEE TO GIVE NOTICE

The Chapter 7 Trustees shall prepare and mail Notices as follows:

1) Notices of Sale as provided in Bankruptcy Rule 6004 and setting the time for filing objections to any sale to within at least fifteen (15) days of the date of the mailing of said Notice.
2) Notice of Hearing on the final account (final meeting) in a Chapter 7 case if the net proceeds realized exceed $250.00.

The Chapter 7 Trustee shall prepare and file with the Clerk a Certificate of Service showing when and to whom such Notices were mailed within three (3) days thereafter.

CHAPTER 11 PROVISION (20-22)

RULE NO. 20

CHAPTER 11 INTERIM FEE PROCEDURE

I. Establishment of Procedure

(a) No application for interim compensation shall be considered by the Court unless the requirements of 11 U.S.C. Section 331 are met.

II. Dates of Hearing on Fee Applications

(a) In cases venued in the Charlotte Division, fees will be considered on the last Thursday in April, July, October, and January at 9:30 A.M.
(b) In cases venued in Asheville, Statesville, and Shelby, fees will be considered during the first *full* day of the Bankruptcy Court calendar in that Division at 9:30 A.M. in April, July, October, and January.

(c) Fee applications are to be scheduled for hearing in the Division in which the case is venued unless the applying party has made application to the Court and been granted an order directing otherwise.

III. Service of Application and Notice of Hearing

(a) In all cases, applications for interim fees will be served by the applying party on the debtor and the debtor's counsel.

(b) In all cases in which there is a committee of equity security holders, or a committee of unsecured creditors or other court appointed committee, a copy of the application shall be served on the chairman of each such committee and on its counsel if such has been appointed, or otherwise on members who have accepted appointment to the creditors committee.

(c) If a trustee has been appointed, a copy of the application shall be served on the trustee.

(d) Copies of the application must be served on the required parties and filed with the Court along with a Certificate of Service twenty (20) days prior to the date on which the application is scheduled for hearing.

(e) In addition to a copy of the application, the parties set out above together with any parties who have requested notices pursuant to Rule 2002(i) are to be served with notice of the time and place of the hearing, the identity of the applicant, the amount requested, their opportunity to be heard at said time, and their right to file specific written objections to the applied for fees with the Court prior to the hearing.

(f) Four copies of the application must be filed with the Court.

RULE NO. 21

NOTICES REQUIRED TO BE SENT BY CHAPTER 11 DEBTORS

In Chapter 11 proceedings, the debtor in possession shall be responsible for mailing the following notices and documents to creditors, after having their form and content approved by the Clerk's Office, and for filing a Certificate of Mailing with the Clerk's Office within five (5) days of the date of the mailing:

1) notice of the meeting of creditors
2) notice of the hearing on disclosure statement
3) the plan
4) the disclosure statement
5) notice regarding balloting and date for hearing on conformation
6) order of confirmation
7) any other notices as the Court or Clerk shall direct in a particular proceeding.

RULE NO. 22

CHAPTER 11 CLAIMS

In a Chapter 11 case, a proof of claim (if required to be filed) shall be filed within ninety (90) days after the date first set for the meeting of creditors called pursuant to § 341(a) of the Bankruptcy Code, except as otherwise specified.

Court Comment. — This supplements Rule 303(c)(3).

CHAPTER 13 PROVISIONS

RULE NO. 23

REQUIREMENTS FOR PAYMENT OF FILING FEES IN INSTALLMENTS

I. No petition on behalf of an individual shall be accepted for filing by the Clerk unless it is accompanied by full payment of the filing fee or a properly completed application to pay fees in installments.

a) To be deemed complete the application must
   1) Set out why the debtor cannot pay the full fee at the time of filing.
   2) Set out a payment schedule that complies with the requirements of Rule 1006(b)(2).
   3) Contain a statement that the debtor's attorney has received no payment for fees and will accept none until the filing fees are paid in full.
   4) Contain a statement that the debtor does not owe any outstanding fees to the Court on account of any other prior proceeding.
   5) Be signed by both the debtor and the debtor's attorney.

II. Action on Application

a) Following the filing of a petition and application, each application will be reviewed by the Court and an order entered granting or denying the application. Should the application be denied, the debtor shall have ten (10) days from the date of the order to pay the full fee. If the full fee is not paid within ten (10) days of the order, the petition will be dismissed by the Court without any further prior notice.

III. Action upon Failure to Make Payments

a) The debtor and the debtor's attorney are responsible for knowing the date payments are due. The Clerk's office will not send reminders or notices.

b) Upon the failure to make any payment as scheduled, the petition is subject to dismissal after hearing notice to the debtor and trustee. Under no circumstances shall the failure of the Court to dismiss for a missed or late payment be deemed to be acquiescence in or forgiveness of such action.

c) In Chapter 13 proceedings filing fees must be paid directly to the Clerk and may not be paid through the Standing Trustee, whether the payments are in full or installments.

RULE NO. 24

PAYMENTS TO CREDITORS IN CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASES

Chapter 13 Standing Trustees are authorized to make payments to creditors in amounts smaller than $15 without waiting for that creditor's dividends to accumulate to $15. The decision as to whether to make smaller payments shall be made in each case by the Trustee and such decision shall be solely the Trustee's discretion as to the best administration of the individual estate.

RULE NO. 25

FILING OF CLAIMS IN CHAPTER 13 PROCEEDINGS

I. Filing Claims

A. Proofs of claim in Chapter 13 proceedings shall be filed directly with the office of the Standing Trustee to whom the case is assigned. The address of the proper Standing Trustee will be shown on the notice of creditors meeting. Claims will be dated and stamped as received as of the date they arrive in the Trustee's office and the claim shall be deemed filed with the Court as of that date.

II. Claims Docket

A. The staff of the Chapter 13 Trustee shall prepare a claims docket for each proceeding referred to that trustee and such claims docket shall be transferred to the Clerk's Office at the closing of the case along with the original claims and made a part of the permanent record.

RULE NO. 26

PROCEDURE FOR OBJECTING TO OR CONFIRMING CHAPTER 13 PLANS

I. Confirmation of Plans

(a) It shall be the practice of this Court that following the 341(a) meeting of creditors, if the trustee recommends confirmation, the plan meets the requisite legal criteria, and there were no properly lodged objections to confirmation, an order of confirmation will be tendered to the Judge for consideration without further notice, unless an objection to confirmation is timely filed.

(b) The plan will be confirmed as of the date of filing the order of confirmation. A supplemental order of confirmation which will not substantively change the plan but which will set out the various aspects of the plan with more particularity may subsequently be entered.

II. Objections to Confirmation

(a) An objection to confirmation must be filed as a separate document in writing within five (5) days of the adjournment of the 341(b) meeting or it will not be considered by the Court.

(b) If an oral objection to confirmation is made at the 341(a) meeting, the objecting party must give in writing his name, address and phone number to the presiding officer who will note the objection on the memorandum of the meeting. Within five (5) days the objecting party must then file a formal written objection with the Court or a notice of withdrawal of objection. If neither is done, the objection will be rendered moot, and the case will continue as if no objection has been announced.

(c) All properly filed objections to confirmation shall be set for hearing by the Court upon proper notice. When a hearing is set on a properly lodged objection, the objecting creditor, the debtor and the debtor's attorney, and the trustee will be noticed.

III. The objecting party must serve a copy of the written objection on the debtor, the debtor's attorney and the trustee at the time of filing, and a voluntary withdrawal of an objection to confirmation must be filed and served in like manner.

RULE NO. 27

INCOME TAX REFUNDS

I. The Internal Revenue Service is authorized and directed to make income tax refunds, in the ordinary course of business, directly to debtors in Chapter 7 and 13 cases unless otherwise ordered by the Bankruptcy Court or otherwise instructed by the Trustee in Chapter 7 cases and the Standing Trustee in the Chapter 13 cases.

II. The Internal Revenue Service is authorized to offset against any refund due a debtor any taxes due the United States Government.

III. The Internal Revenue Service is authorized to assess any tax liability satisfied by offsetting any refunds, when such liability has not previously been assessed.

IV. The Internal Revenue Service is authorized to assess tax liabilities shown on voluntarily filed returns and other agreed-to tax liabilities.

RULE NO. 28

SEARCH FEE CHARGED BY CHAPTER 13 TRUSTEE

The Standing Chapter 13 Trustees are authorized to charge a Two Dollar ($2.00) search fee when answering inquiries which require a search of the records for each case with respect to which the inquiry is made, to use as a part of their operating expenses. Said Trustees shall account to the Court for such funds so collected.

RULE NO. 29

TRUSTEE VALUATION OF CREDITOR'S SECURITY

After notice, a Chapter 13 Trustee may determine the value of a creditor's security at the § 341(a) creditors meeting, and unless an objection is filed within ten (10) days after notice of such valuation, the Court may accept the valuation for the purpose of distribution under the Plan.

Court Comment. — This supplements Rule 3012.

RULE NO. 30

SECURED CREDITOR CONTACT WITH CHAPTER 13 DEBTOR

In Chapter 13 cases, affected secured creditors may:

1. Inquire of the debtor directly about the status of insurance coverage on property used as collateral.
2. Contact the debtor to inquire about post-petition payments to be made outside the Plan directly to the creditor and on such payments the creditor may issue post-petition delinquency notices.

3. Provide information directly to the debtor upon inquiry relative to the status of the account including information as to interest paid.

LOCAL RULE NO. 31

CHAPTER 13 ATTORNEY FEE PROCEDURE

I. Amount of Fee

(a) There shall be a presumption that $500.00 is a fair fee for an attorney to charge for handling a Chapter 13 proceeding; however, attorneys are encouraged to negotiate a lesser fee with the client if actual time and materials would warrant.

(b) Any fee over the presumptively fair $500.00 or additional fees that may be incurred over the life of the Chapter 13 proceeding must be applied for and approved by the Court after notice to the debtor, trustee and all creditors and a hearing. A full explanation of the necessity of services and documentation of time and materials expended must be attached to the application or it will not be considered.

II. Payment of Fee

(a) An attorney may accept an amount of compensation in advance of the filing of the Chapter 13 proceeding up to the maximum of $500.00 presumptively fair fee on the following conditions:

(i) All court filing fees must be paid in full at the time the proceeding is filed (No installment fees to be applied for) and,

(ii) The debtor must appear at the time first set for the 341(a) meeting with no less than one full month's plan payment to turn over to the trustee.

(b) If an attorney accepts a retainer and either (i) or (ii) of (a) above is not met, the attorney must either pay the delinquent fees and/or plan payment from the retainer held.

(c) If an attorney elects to have all or part of the attorney fees paid through the Plan rather than as a retainer directly from the client, such fees shall be paid by the trustee as a priority claim.

ADVERSARY PROCEEDINGS (32 TO 35)

RULE NO. 32

SERVICE ON PARTIES

Any and all filings (except claims) in all proceedings under the Bankruptcy Code must be served on the debtor's attorney and trustee (including the Chapter 13 Standing Trustee) for the estate whether or not such Trustee is a party to the proceeding.

RULE NO. 33

MOTION PRACTICE FOR RELIEF FROM STAY AND AVOIDANCE OF LIENS

All motions for relief from stay and all motions to avoid liens filed in this Court shall be accompanied by a notice of motion and certificate of service, giving notice of the filing of the motion, allowing a specific response time to the motion, and setting forth the name and address of each person served with a copy of the motion and notice of motion. With respect to such motions, a responsive pleading shall be required to be filed by the respondent within fifteen (15) days of the date of the aforesaid notice of motion and certificate of service. A hearing on such motion may be ordered by the Court in its discretion, but unless so ordered, or unless a hearing is specifically requested in the motion or any responsive pleading thereto, such motion may be determined and final orders entered by the Court without a hearing.

Court Comment. — This supplements Rule 9014.

RULE NO. 34

ADVERSARY PROCEEDING COVER SHEET REQUIRED

All complaints initiating adversary proceedings in bankruptcy cases shall be accompanied by a fully completed Bankruptcy Cover Sheet (Form BC-104).

RULE NO. 35

DISMISSAL OF ADVERSARY PROCEEDING FOR LACK OF PROSECUTION

Except where a Complaint objecting to a discharge has been filed, an Adversary Proceeding may be dismissed by the Court for lack of prosecution as follows:

1) Where No Service of Process has been made and certified to the Court within thirty (30) days after filing of the Complaint; or
2) Where no responsive pleadings have been filed and plaintiff has not moved for Entry of Default within thirty (30) days after the time for filing responsive pleadings has expired.

Dismissal under the Local Rule shall be without prejudice unless the delay has resulted in prejudice to an opposing party.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In the Matter of:) Case No. _____
)
) DEBTOR'S CLAIM FOR
) PROPERTY EXEMPTIONS
)
)
Debtor.)

I, _____, the undersigned debtor, hereby claim the following property as exempt pursuant to Chapter 1C, Article 16, § 1C-1601 et seq. of the North Carolina General Statutes.

1. REAL OR PERSONAL PROPERTY USED BY DEBTOR OR DEBTOR'S DEPENDENT AS RESIDENCE OR BURIAL PLOT. (Total net value not to exceed $7,500. Amount of the unused portion of first $2,500 may be carried forward to be applied on other property claimed as exempt.)

Description of Property & Address	Market Value	Mtg. Holder or Lien Holder	Amt. Mtg. or Lien	Net Value
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

(a) Total Net Value $_____
Total Net Exemption $_____

(b) Unused portion of first $2,500. (This amount, if any, may be used to claim an exemption in any property owned by the debtor.) $_____

2. MOTOR VEHICLE. (Only one vehicle allowed under this paragraph with net value claimed as exempt not to exceed $1,000 plus any portion desired for use from paragraph 1(b) above.)

Model, Year Style of Auto	Market Value	Lien Holder	Amt. Lien	Net Value
_____	_____	_____	_____	_____

(a) Statutory allowance $1,000
(b) Amount from 1(b) above to be used in this paragraph. (A part or all of 1(b) may be used as needed.) $_____
Total Net Exemption $_____

3. TOOLS OF TRADE OR PROFESSIONAL BOOKS. (Used by Debtor or Debtor's dependent. Total net value of all items claimed as exempt not to exceed $500.00.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

(a) Statutory allowance $ 500
(b) Amount from 1(b) above to be used in this paragraph. (A part or all of 1(b) may be used as needed.) $_____
Total Net Exemption $_____

4. PERSONAL PROPERTY USED FOR HOUSEHOLD OR PERSONAL PURPOSES USED BY DEBTOR OR DEBTOR'S DEPENDENTS. (Debtor's total net value not to exceed $2,500 plus $500 for each dependent, but not to exceed $2,000 total for all dependents.)

Description of Property	Market Value	Lien Holder	Amt. Lien	Net Value
Clothing & Personal				
Kitchen Appliances				
Stove				
Refrigerator				
Freezer				
Washing Machine				
Dryer				
China				
Silver				
Jewelry				
Living Room Furniture				
Den Furniture				
Bedroom Furniture				
Dining Room Furniture				
Lawn Furniture				
Television				
( ) Stereo ( ) Radio				
Musical Instruments				
( ) Piano ( ) Organ				
Air Conditioner/Dehumid.				
Paintings & Art				
Lawn Mower				
Yard Tools				
Crops				
Animals				
Recreational Equipment				

Total Net Value _____

(a) Statutory allowance for debtor _____

(b) Statutory allowance for debtor's dependents: _____ dependents at $500 each (not to exceed $2,000 for total dependents) _____

(c) Amount from 1(b) above to be used in this paragraph. (A part or all of 1(b) may be used as needed.) _____

Total Net Exemption _____

5. LIFE INSURANCE. (As provided in Article X, Section 5 of North Carolina Constitution.)

Name of Insurance Company _____ Policy No. _____

Name of Insured _____ Policy Date _____

Name of Beneficiary _____

6. PROFESSIONALLY PRESCRIBED HEALTH AIDS (FOR DEBTOR OR DEBTOR'S DEPENDENTS). (No limit on value or number of items.)

Description: _____

_____

7. DEBTOR'S RIGHT TO RECEIVE FOLLOWING COMPENSATION:
(No limit on number or amount.)

A. $_____ Compensation for personal injury to debtor or to person on whom debtor was dependent for support.

B. $_____ Compensation for death of person on whom debtor was dependent for support.

8. ANY OTHER REAL OR PERSONAL PROPERTY WHICH DEBTOR DESIRES TO CLAIM AS EXEMPT THAT HAS NOT PREVIOUSLY BEEN CLAIMED ABOVE. (THE AMOUNT CLAIMED MAY NOT EXCEED THE REMAINING AMOUNT AVAILABLE UNDER PARAGRAPH 1(b) WHICH HAS NOT BEEN USED FOR OTHER EXEMPTIONS.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

(a) Total Net Value of property claimed in paragraph 8. $_____
(b) Total amount available from paragraph 1(b). $_____
(c) Less amount available under paragraph 1(b) which was used in other paragraphs:

Paragraph 2(b)	$_____
Paragraph 3(b)	$_____
Paragraph 4(c)	$_____
Net Balance Available from paragraph 1(b)	$_____
Total Net Exemption	$_____

9. THE FOLLOWING TANGIBLE PERSONAL PROPERTY WAS PURCHASED BY THE DEBTOR WITHIN 90 DAYS OF THE FILING OF THE BANKRUPTCY PETITION:

Description	Market Value	Lien Holder	Amt. Lien	Net Value
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

None of the property listed in paragraph 9 has been included in this Request for Exempt Property. (Tangible personal property purchased within 90 days of the filing of the petition cannot be exempted.)

DATE: _____

_____
Debtor

BC 104
(Rev. 7/82)

BANKRUPTCY COVER SHEET

The BC104 Bankruptcy Cover Sheet and the information contained herein neither replace nor supplement the filing and service of other papers as required by law or by local rules of court. This form is required for the use of the clerk of the Bankruptcy Court for the purpose of initiating the bankruptcy docket sheet for proceedings under 28 U.S.C. 1471.

PLAINTIFFS	DEFENDANTS
ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	ATTORNEYS (IF KNOWN)

(PLACE AN X IN ONE BOX ONLY) PARTY

☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☐ 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED.)

(PLACE AN X IN ONE BOX ONLY) NATURE OF SUIT

☐ 110 INSURANCE	☐ 355 MOTOR VEHICLE PRODUCT LIABILITY	☐ 432 TURNOVER COMPLAINT BY TRUSTEE
☐ 130 MILLER ACT	☐ 362 PERSONAL INJURY MED. MALPRACTICE	☐ 433 SALE FREE AND CLEAR OF LIENS
☐ 140 NEGOTIABLE INSTRUMENT	☐ 365 PERSONAL INJURY PRODUCT LIABILITY	☐ 434 INJUNCTIVE RELIEF
☐ 160 STOCKHOLDERS SUITS	☐ 370 FRAUD OR TRUTH-IN-LENDING	☐ 435 DETERMINE VALIDITY, PRIORITY & EXTENT OF LIEN
☐ 195 CONTRACT PRODUCT LIABILITY	☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY	☐ 436 SELLER RECLAMATION 546 (c)
☐ 210 CONDEMNATION	☐ 410 ANTI-TRUST	☐ 437 TRANSFER AND OBLIGATION AVOIDANCE BY TRUSTEE
☐ 230 RENT LEASE & EJECTMENT	☐ 418 AUTOMATIC STAY LITIGATION	☐ 438 LIEN AVOIDANCE BY DEBTOR 522(f)
☐ 240 TORTS TO LAND	☐ 424 OBJ/REVOCATION DISCHARGE 727	☐ 439 LIEN ENFORCEMENT (RECLAMATION)
☐ 245 TORT PRODUCT LIABILITY	☐ 425 DISCHARGEABILITY 523 (a) (2)	☐ 450 COMMERCE ICC RATES, ETC
☐ 310 AIRPLANE	☐ 426 DISCHARGEABILITY 523 (a) (4)	☐ 540 MANDAMUS & OTHER
☐ 315 AIRPLANE PRODUCT LIABILITY	☐ 427 DISCHARGEABILITY 523 (a) (5)	☐ 850 SECURITIES COMMODITIES EXCHANGE
☐ 320 ASSAULT LIBEL & SLANDER	☐ 428 DISCHARGEABILITY 523 (a) (6)	☐ 870 TAXES
☐ 330 FEDERAL EMPLOYER S LIABILITY	☐ 429 DISCHARGEABILITY (OTHER)	☐ 820 COPYRIGHT
☐ 345 MARINE PRODUCT LIABILITY	☐ 430 BANKS AND BANKING	☐ 830 PATENT
☐ 350 MOTOR VEHICLE	☐ 431 RECOVER ACCOUNTS RECEIVABLE	☐ 840 TRADEMARK
		☐ 499 OTHER ACTIONS

(PLACE AN X IN ONE BOX ONLY) ORIGIN

☐ 1 ORIGINAL PROCEEDING ☐ 2 REMOVED FROM STATE/DISTRICT COURT ☐ 3 REMANDED FROM APPELLATE COURT ☐ 4 REINSTATED OR REOPENED ☐ 5 TRANSFERRED FROM ANOTHER BANKRUPTCY COURT (SPECIFY DISTRICT) ☐ 6 MULTIDISTR LITIGATION

UNITED STATES BANKRUPTCY COURT

(Continued on Reverse Side)

BC 104
(Rev. 7/82)

BANKRUPTCY COVER SHEET (Reverse Side)

REMARKS	*Check/Fill in if demanded in complaint:*		
	☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND $	OTHER
	RELATED PROCEEDING(S), IF ANY, PENDING		
	JUDGE _____ BANKRUPTCY DOCKET NUMBER _____		
	PROCEEDINGS RISING OUT OF BANKRUPTCY CASES ARE DEEMED RELATED IF PROCEEDINGS INVOLVE:		
	☐ 1. SAME PROPERTY		
	☐ 2. SAME ISSUE OF FACT OR SAME TRANSACTION		
Check YES only if demanded in complaint:	☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT COPYRIGHT OR TRADEMARK		
JURY DEMAND: ☐ YES ☐ NO			

DATE SIGNATURE OF ATTORNEY OF RECORD

INSTRUCTIONS

Form BC 104, Bankruptcy Cover Sheet, and the information contained therein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the clerk of the bankruptcy court in initiating the bankruptcy docket sheet for adversary proceedings under 28 U.S.C. Section 1471, and to facilitate the gathering of statistical information. Accordingly, a bankruptcy proceeding cover sheet is to be submitted to the clerk of the bankruptcy court for each complaint filed. The form is largely self explanatory. Two areas needing possible explanation are the CAUSE OF ACTION and NATURE OF SUIT portions of the form.

Under *Cause of Action* give a brief narrative description of the cause of action including all Federal statutes involved. For example, "Complaint seeking damages for failure to disclose information, Consumer Credit Protection Act, 15 U.S.C. 1601 et. seq.".

Under *Nature of Suit* place an "X" in the appropriate box. Only one box should be checked. If the cause fits more than one nature of suit, select the most definitive. This list is not all-inclusive. If the action does not fall within one of the specifically listed categories, you should check #499, other actions, [e.g., a tort action other than one specifically listed or an action pursuant to E.R.I.S.A.].

Because there are several categories involving liens, the following additional information should be used as a guide in making the proper selection.

#437 Transfer and Obligation Avoidance By Trustee — Complaint by a trustee to avoid a transfer, lien or obligation pursuant to any of a trustee's powers to do so.

#433 Sale Free and Clear of Lien — Complaint to sell property free and clear of any interest in such property.

#439 Lien Enforcement (Reclamation) — Complaint by a party who has a lien against property of the estate seeking to 1) terminate or modify the automatic stay, 2) obtain possession, and 3) foreclose all other interests in the property. If a secured party seeks only to lift the stay with respect to such property, then #418 automatic stay litigation should be checked.

#435 Determine Validity, Priority or Extent of Lien — Complaint asking court to make a determination involving a question of a lien's validity, priority or amount.

#438 Lien Avoidance By Debtor §522 — Complaint by debtor to avoid a lien to the extent it impairs an exemption.

If this adversary proceeding is related to any other pending adversary proceeding, enter the six digit adversary proceeding docket number in the space indicated. ALSO indicate in the "Remarks" portion of the form the name of the debtor in, and the name of the docket number of, the bankruptcy *case* out of which the proceeding arose, and identify the district where the bankruptcy case is pending or was pending when closed, if different from the district in which this proceeding is being filed.

Appendix VI. Rules, Regulations and Organization of The North Carolina State Bar

Article VI.

Meetings of the Council.

Sec.

5. Standing Committees of the Council.

Article IX.

Discipline and Disbarment of Attorneys.

Determination of Disability.

5. Chairman of the Grievance Committee — Powers and Duties.

Sec.

6. Grievance Committee — Powers and Duties.
13. Preliminary Hearing.
23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.
29. Confidentiality.

Article VI.

Meetings of the Council.

§ 5. Standing Committees of the Council.

k. A board of legal specialization to be composed of nine members appointed by the Council of the North Carolina State Bar. The plan of specialization shall be a voluntary endeavor and not mandatory and not be funded by membership fees of the North Carolina State Bar.

1. Purpose

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, allowing the public to more closely match their needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

2. Establishment of Board of Legal Specialization

The Council of the North Carolina State Bar with the approval of the Supreme Court hereby establishes a Board of Legal Specialization ("Board"), which Board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers. The Board shall be composed of nine members appointed by the Council of the North Carolina State Bar, three of whom shall be non-lawyers and the remainder shall be lawyers currently licensed and in good standing to practice law in North Carolina. The lawyer members of the Board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize. One of the lawyer members shall be designated annually by the Council of the North Carolina State Bar as Chairperson of the Board. The members shall be appointed by the Council of the North Carolina State Bar to staggered terms of office and the initial appointees shall serve as follows: three (two lawyers and one non-lawyer) shall serve for one year after appointment; three (two lawyers and one non-lawyer) shall serve for two years after appointment and three (two lawyers and one non-lawyer) shall serve for three years after appointment. Appointment to a vacancy among the members shall be made by the Council of the North Carolina State Bar for the remaining term of that member leaving the Board. Any member shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term.

Meetings of the Board shall be held at regular intervals at such times and places and upon such notice as the Board may from time to time prescribe.

3. Powers and Duties of the Board

Subject to the general jurisdiction of the Council and the North Carolina Supreme Court, the Board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty:

3.1 To administer the Plan;

3.2 Subject to the approval of the Council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialties and to provide procedures for the achievement of these purposes;

3.3 To appoint, supervise, act on the recommendations of and consult with Specialty Committees as hereinafter identified;

3.4 To make and publish standards for the certification of specialists, upon the Board's own initiative or upon consideration of recommendations made by the Specialty Committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

3.5 To certify specialists or deny, suspend or revoke the certification of specialists upon the Board's own initiative, upon recommendations made by the Specialty Committees or upon requests for review of recommendations made by the Specialty Committees;

3.6 To establish and publish procedures, rules, regulations and bylaws to implement this Plan;

3.7 To propose, and request the Council to make amendments to this Plan whenever appropriate;

3.8 To cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Code of Professional Responsibility of this state to the appropriate disciplinary authority;

3.9 To evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the Board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists; and

3.10 To cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization.

4. Retained Jurisdiction of the Council

The Council retains jurisdiction with respect to the following matters:

4.1 Upon recommendation of the Board, establishing areas in which certificates of specialty may be granted;

4.2 Amending this Plan;

4.3 Hearing appeals taken from actions of the Board;

4.4 Establishing or approving fees to be charged in connection with the Plan; and

4.5 Regulating attorney advertisements of specialization under the North Carolina Code of Professional Responsibility.

5. Privileges Conferred and Limitations Imposed

The Board in the implementation of this Plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers:

5.1 No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the North Carolina Code of Professional Responsibility, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist, in a particular field of law;

5.2 No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Code of Professional Responsibility, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his availability to practice in any field of law consistent with Canon 2 of the Code of Professional Responsibility, even though he or she is not certified as a specialist in that field;

5.3 All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member;

5.4 Participation in the program shall be on a completely voluntary basis;

5.5 A lawyer may be certified as a specialist in no more than two fields of law;

5.6 When a client is referred by another lawyer to a lawyer who is a recognized specialist under this Plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Code of Professional Responsibility of this state, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field; and

5.7 Any lawyer certified as a specialist under this Plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Code of Professional Responsibility of this state.

Specialty Committees

The Board shall establish a separate Specialty Committee for each specialty in which specialists are to be certified. Each Specialty Committee shall be composed of seven members appointed by the Board, one of whom shall be designated annually by the Chairperson of the Board as Chairperson of the Specialty Committee. Members of each Specialty Committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the Board, are competent in the fields of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the Board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the Board to a vacancy shall be for the remaining term of the member leaving the Specialty Committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the Specialty Committee shall be held at regular intervals, at such times, places and upon such notices as the Specialty Committee may from time to time prescribe or upon direction of the Board.

Each Specialty Committee shall advise and assist the Board in carrying out the Board's objectives and in the implementation and regulation of this Plan in that specialty. Each Specialty Committee shall advise and make recommendations to the Board as to standards for the specialty and the certification of individual specialists in that specialty. Each Specialty Committee shall be charged with actively administering the Plan in its specialty and with respect to that specialty shall:

6.1 After public hearing on due notice, recommend to the Board reasonable and nondiscriminatory standards applicable to that specialty;

6.2 Make recommendations to the Board for certification, continued certification, denial, suspension or revocation of certification of specialists and for procedures with respect thereto;

6.3 Administer procedures established by the Board for applications for certification and continued certification as a specialist and for denial, suspension or revocation of such certification;

6.4 Administer examinations and other testing procedures, if applicable, investigate references of applicants; and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

6.5 Make recommendations to the Board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty; and

6.6 Perform such other duties and make such other recommendations as may be requested of or delegated to the Specialty Committee by the Board.

7. Minimum Standards for Certification of Specialists

To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the Board for the particular area of specialty:

7.1 The applicant must be licensed and currently in good standing to practice law in this state;

7.2 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the area of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advanced educational degree, teaching, judicial, government or corporate legal experience;

7.3 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of continuing legal education in the specialty accredited by the Board for the specialty, the minimum being an average of twelve hours of credit for continuing legal

education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the Board, upon advice from the appropriate Specialty Committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty; and

7.4 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant, or at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the Board, or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

7.5 The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The Board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

7.6 All information contained in the application and supporting documents submitted for certification under this section and for re-certification under section 8 shall be confidential and shall be available for use only, by either the Board, the appropriate Specialty Committee, or any appropriate body in event of an appeal, to determine the qualifications of the applicant for certification. Any scores on any examinations required under these Rules shall likewise be confidential and used under the same circumstances; however, the score may be released to the applicant.

8. Minimum Standards for Continued Certification of Specialists

The period of certification as a specialist shall be five years. During such period the Board or appropriate Specialty Committee may require evidence from the specialist of his or her continued qualification for certification as a specialist and the specialist must consent to inquiry by the Board, or appropriate Specialty Committee, of lawyers and judges, the appropriate disciplinary body or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the Board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards:

8.1 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Section 7.2) in the specialty during the entire period of certification as a specialist;

8.2 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of continuing legal education accredited by the Board for the specialty during the period of certification as a specialist, the minimum being an average of twelve hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist; and

8.3 The specialist must comply with the requirements set forth in Sections 7.1 and 7.4 above.

9. Establishment of Additional Standards

The Board may establish, on its own initiative or upon the Specialty Committee's recommendation, additional or more stringent standards for certification than those provided in Section 7 and 8. Additional standards or requirements established under this section need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more nor less stringent than the requirements in any other area of specialty.

10. Suspension or Revocation of Certification as a Specialist

The Board may revoke its certification of a lawyer as a specialist if the specialization program in the specialty is terminated or may suspend or revoke such certification if it is determined, upon the Board's own initiative or upon recommendation of the appropriate Specialty Committee and after hearing before the Board on appropriate notice, that:

10.1 The certification of the lawyer as a specialist was made contrary to the rules and regulations of the Board;

10.2 The lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the Board or appropriate Specialty Committee;

10.3 The lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the Board;

10.4 The lawyer certified as a specialist has failed to pay the fees required;

10.5 The lawyer certified as a specialist no longer meets the standards established by the Board for the certification of specialists; or

10.6 The lawyer certified as a specialist has been disciplined, disbarred or suspended from practice by the Supreme Court of any other state or federal court or agency.

The lawyer certified as a specialist has a duty to inform the Board promptly of any fact or circumstance described in Sections 10.1 through 10.6, above.

If the Board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist, and upon such other conditions as the Board may prescribe. If the Board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefor and compliance with such conditions and requirements as the Board may prescribe.

11. Right to Hearing and Appeal to Council

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the Board and, thereafter, the right to appeal the ruling made thereon by the Board to the Council under such rules and regulations as the Board and Council may prescribe.

12. Financing the Plan

The financing of the Plan shall be derived solely from applicants and participants in the Plan. If fees are not established by the Council, the Board shall establish reasonable fees in each specialty field in such amounts as may be necessary to defray the expense of administering the Plan, which fees may be adjusted from time to time. If established or adjusted by the Board, however, the fees must be approved by the Council as provided in Section 4.4 above.

Only Part of Rule Set Out. — As the rest of § 5 was not affected, only subdivision k is set out.

Effect of Amendments. — The amendment approved March 6, 1984, added Section 7.6 to subdivision k.

ARTICLE IX.

Discipline and Disbarment of Attorneys.

Determination of Disability.

§ 5. Chairman of the Grievance Committee — Powers and Duties.

(A) The Chairman of the Grievance Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Grievance Committee that an investigation be initiated.

(3) To recommend to the Grievance Committee that a grievance be dismissed.

(4) To direct a Letter of Notice to an accused attorney.

(5) To issue, at the direction and in the name of the Grievance Committee, a Letter of Caution, a Private Reprimand, or a Public Censure to an accused attorney.

(6) To notify an accused attorney that a grievance has been dismissed, and to notify the complainant in accordance with § 21.

(7) To call meetings of the Grievance Committee for the purpose of holding preliminary hearings.

(8) To issue subpoenas in the name of the North Carolina State Bar or direct the Secretary to issue such subpoenas.

(9) To administer oaths or affirmations to witnesses.

(10) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Grievance Committee shall perform the functions of the Chairman of the Grievance Committee in any matter when the Chairman is absent or disqualified.

Effect of Amendments. — The amendment approved March 6, 1984, rewrote subsection (A)(5).

§ 6. Grievance Committee — Powers and Duties.

The Grievance Committee shall have the power and duty:

(6) To issue a public censure of an accused attorney in cases wherein a complaint and hearing are not warranted but the conduct warrants more than a private reprimand.

(7) To direct that petitions be filed seeking a determination whether a member of The North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.

Only Part of Rule Set Out. — As the rest of § 6 was not affected by the amendment, it is not set out.

Effect of Amendments. — The amendment approved March 6, 1984, added present subsection (6) and redesignated former subsection (6) as subsection (7).

§ 13. Preliminary Hearing.

(11) If probable cause is found and it is determined by the Grievance Committee that a complaint and hearing are not warranted but the conduct warrants more than a Private Reprimand, the Committee may issue a notice of proposed public censure to the accused attorney. A copy of the proposed public censure shall be served upon the accused attorney as provided in G.S. § 1A-1, Rule 4. The accused attorney must be advised that he may accept the public censure within fifteen days after service upon him or a formal complaint will be filed before the Disciplinary Hearing Commission. The accused attorney's acceptance must be in writing, addressed to the Grievance Committee and filed with the Secretary. Once the public censure is accepted by the accused, the discipline becomes public and must be filed as provided by § 23(A)(2).

(12) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.

Only Part of Rule Set Out. — As the rest of § 13 was not affected by the amendment, it is not set out.

Effect of Amendments. — The amendment approved March 6, 1984, added present subsection (11) and redesignated former subsection (11) as subsection (12).

§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions shall be taken.

(1) *Reprimand.* A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission, depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary, and shall be considered confidential.

(2) *Public Censure, Suspension or Disbarment.* The Chairman of the Disciplinary Hearing Commission or the chairman of the Grievance Committee shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

Only Part of Rule Set Out. — As the rest of § 23 was not affected by the amendment, it is not set out.

Effect of Amendments. — The amendment approved March 6, 1984, inserted a reference to the Chairman of the Grievance Committee in the first sentence of subdivision (A)(2).

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by an attorney shall remain confidential until the complaint against an accused attorney has been filed with the Secretary of The North Carolina State Bar as a result of the Grievance Committee of The North Carolina State Bar having found that there is probable cause to believe that said accused attorney is guilty of misconduct justifying disciplinary action, or the accused attorney requests that the matter

be public prior to the filing of the aforementioned complaint, or the investigation is predicated upon a conviction of the accused attorney of a crime, except the previous issuance of a private reprimand to an accused attorney may be revealed in any subsequent disciplinary proceeding. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or a Hearing Committee of the Disciplinary Hearing Commission enters an order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law-enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

Effect of Amendments. — The amendment approved March 6, 1984, rewrote the first sentence.

Appendix VII. Code of Professional Responsibility of The North Carolina State Bar

Canon 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.
Disciplinary Rules.
DR 7-107 Trial Publicity.

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

DISCIPLINARY RULES

DR1-102 Misconduct.

CASE NOTES

Applied in North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983).

Cited in North Carolina State Bar v. Braswell, — N.C. App. —, 313 S.E.2d 272 (1984).

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

DISCIPLINARY RULES

DR2-106 Fees for Legal Services.

Legal Periodicals. — For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

DISCIPLINARY RULES

DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

CASE NOTES

Applied in Stanwood Corp. v. Barnum, 575 F. Supp. 1250 (W.D.N.C. 1983).

DR5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

CASE NOTES

Applied in Stanwood Corp. v. Barnum, 575 F. Supp. 1250 (W.D.N.C. 1983).

DR5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

CASE NOTES

Applied in State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983).

CANON 6

A Lawyer Should Represent a Client Competently

DISCIPLINARY RULES

DR6-101 Failing to Act Competently.

CASE NOTES

Cited in North Carolina State Bar v. Braswell, — N.C. App. —, 313 S.E.2d 272 (1984).

CANON 7

A Lawyer Should Represent a Client Zealously within the Bounds of the Law

ETHICAL CONSIDERATIONS

Duty of the Lawyer to a Client.

EC7-7

CASE NOTES

Applied in State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

EC7-8

CASE NOTES

Duty to Advise of Plea Bargain Offer. — One relevant consideration is the availability of a plea bargain — in order for a defendant to make a fully informed decision on what plea to enter, he must be made aware of any possible plea bargain. A lawyer thus is ethically bound to advise his client of a plea bargain offer. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

DISCIPLINARY RULES

DR7-101 Representing a Client Zealously.

CASE NOTES

Cited in North Carolina State Bar v. Braswell, — N.C. App. —, 313 S.E.2d 272 (1984).

DR7-102 Representing a Client within the Bounds of the Law.

CASE NOTES

Applied in North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983).

DR7-106 Trial Conduct.

CASE NOTES

Cited in State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983).

DR7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding. A lawyer may state:
(1) Information contained in a public record.
(2) That the investigation is in progress.
(3) The general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim.
(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
(5) A warning to the public of any danger.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until conclusion of jury proceedings, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding and relates to:
(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
(4) The performance or results of any examination or tests or the refusal or failure of the accused to submit to examination or tests.
(5) The identity, testimony, or credibility of a prospective witness.
(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:
(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(3) A request for assistance in obtaining evidence.
(4) The identity of the victim of the crime.
(5) The fact, time and place of arrest, resistance, pursuit, and use of weapons.
(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) The nature, substance, or text of the charge.
(8) Quotations from or references to public records of the court in the case.
(9) The scheduling or result of any step in the judicial proceedings.
(10) That the accused denies the charges made against him.

(D) (a) A lawyer shall neither make nor cause another person to make an extrajudicial statement regarding a civil jury proceeding (or admin-

istrative proceeding from which or ancillary to which the right to a civil jury trial exists) that a reasonable person would expect to disseminated by means of public communication and that the lawyer knows or reasonably should know will have a reasonable likelihood of materially prejudicing such jury proceeding and impairing the integrity of the judicial process. An extrajudicial statement will likely have such an effect when the statement relates to:

(1) The character, credibility, reputation, or criminal record (including arrests, indictments or other charges of crime, whether past, present or forthcoming) of a party, witness, prospective party or witness, or the expected testimony of the aforesaid, unless such information would be clearly admissible at the proceeding.

(2) A companion criminal case or proceeding (in which there is a common core of facts in the criminal case or proceeding and the civil jury action) that could result in incarceration, the possibility of a guilty plea to the offense or the existence or contents or any confession, admission, or statement given by a party, witness or prospective party or witness or that person's refusal or failure to make a statement, unless such information would be clearly admissible at the proceeding;

(3) The performance or results of any examination or tests, or the refusal of a person to submit to an examination or test or the identity or nature of physical evidence expected to be presented at trial unless such information would be clearly admissible at the proceeding;

(4) Any opinion as to the guilt or innocence of a party, witness, or prospective party or witness in a companion criminal case or proceeding (in which there is a common core of facts) that could result in incarceration;

(5) The details of a settlement offer or the failure of the other party to accept a settlement offer;

(6) Information the lawyer knows or reasonably should know is likely to be inadmissible at trial and would, if disclosed, create a substantial risk of prejudicing an impartial proceeding;

(7) Any statement of law or facts which the lawyer knows to be false and which would, if stated, create a substantial risk of prejudicing an impartial proceeding;

(8) Any opinion as to the merits of the claims or defense of a party, except as required by law or administrative rule;

(b) Any word, phrase, or sentence in paragraph (a) above which may be found by a court to be in violation of the Constitution of the United States or North Carolina shall be deemed severable from all other words, phrases and sentences of that paragraph.

(c) A lawyer involved in the investigation or litigation of a civil jury matter may state without elaboration:

(1) The general nature of the claim or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of a person involved, when there is a reason to believe that such danger exists; and

(7) In a companion criminal case:
(i) The name, age, residence, occupation, and family status of the accused.
(ii) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(iii) A request for assistance in obtaining evidence.
(iv) The identity of the victim of the crime.
(v) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
(vi) The identity of investigating and arresting officers or agencies and the length of the investigation.
(vii) The nature, substance, or text of the charge.
(viii) Quotations from or references to public records of the court in the case.
(ix) The scheduling or result of any step in the judicial proceedings.

(E) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(F) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

(G) A lawyer, in the representation of a client, shall not knowingly make a false statement of fact, state or allude to any matter or any person not reasonably related to the client's case, or use the public record or the processes of the courts to knowingly convey false statements of fact or other information regarding any matter or any person not reasonably related to the client's case.

Effect of Amendments. — The amendment approved December 6, 1983, rewrote DR 7-107.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

CASE NOTES

Applied in State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983).

DISCIPLINARY RULES

DR9-102 Preserving Identity of Funds and Property of a Client.

CASE NOTES

Applied in North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983).

Appendix VII-A. Code of Judicial Conduct

Canon
6. A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

CASE NOTES

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

CASE NOTES

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

CASE NOTES

Conduct need not be criminal in order to constitute willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Use of a judge's office to grant leniency or favors to a defendant because of sexual activities between a judge and a defendant is willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Assistant District Attorney on Behalf of Another Who Faced Driving under the Influence Charge Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Changing of Parole Conditions without Notice to Solicitor Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(C) Public Reports. A judge shall report the name and nature of any source or activity from which he received more than $1,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, Regular, Special, and Emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the County in which he resides. For each calendar year, such report shall be filed not later than May 15th of the following year.

Only Part of Canon Set Out. — As the rest of Canon 6 was not affected by the amendment, it is not set out.

Effect of Amendments. — The amendment adopted November 3, 1983, effective with the reports covering calendar year 1983 which are to be filed not later than May 15, 1984, rewrote subdivision C.

Appendix X. North Carolina Supreme Court Library Rules

Hours and Use of Library

Rule
3. Hours.

Appendix I

Official Register, State of North Carolina

Hours and Use of Library

3. Hours.

Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from eight-thirty o'clock in the morning until five o'clock in the afternoon.

Effect of Amendments. — The amendment effective January 1, 1984, substituted "eight-thirty" for "nine" and deleted a provision for Saturday morning hours.

Appendix I.

OFFICIAL REGISTER, STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The District Attorneys and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Division of Archives and History.

(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.

(9) The Chairman of the Judicial Standards Commission.

(10) The Secretary-Treasurer of the North Carolina State Bar, Inc.

(11) The State President of the Department of Community Colleges.

Effect of Amendments. — The amendment effective June 21, 1984, added subdivision (11).

Appendix XI. Comparative Tables

(4) TABLE OF LAWS CODIFIED SUBSEQUENT TO 1919

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803	37	158-1 Repealed	803	38	158-2 Repealed

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713	110	105-164.4 note,	761	259	120-4.21 note,
		105-164.6 note			120-4.22 note,
757	14	139-54 note			120-4.25 note,
760	2	105-436.1 note			120-4.28 note
		105-449.16 note,	765	1	N.C. Const.,
		105-449.24 note,			Art. V, § 11
760	4	105-436.1 note,	881	9	7A-102 note
		105-449.16 note,	920	3, 4	131E-83 note
		105-449.24 note	923	52	150A-1 to
761	140	20-63 note,			150A-8 Repealed,
		105-164.4 note,			150A-10 note,
761	225	143-27.2			150A-23 to
	240	120-4.21 note,			150A-64
		120-4.22 note,			Repealed
		120-4.25 note,		217	20-63 note,
		120-4.28 note			105-164.4 note
	259	20-63 note,		217(R)	143-27.2
		105-164.4 note,			

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	2.1	120-2 note	6	1-6	120-2
3	1, 2	163-72.3		6.1	120-2 note
4	1-3	120-1	7	. .	120-2,
	3.1	120-1 note			120-2 note
5	1-4	120-1			

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933		44-51.8	936	. .	163-279 L.M.,
935	. .	163-302 L.M.			163-291 L.M.
936	. .	160A-209 L.M.,	937	. .	69-25.15 L.M.

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939	. .	160A-266 L.M.
940	. .	160A-272 L.M.
941	. .	160A-265 L.M.
942	. .	160A-265 L.M.
944	. .	153A-176 L.M., 160A-272 L.M.
947	. .	160A-514 L.M.
948	. .	115C-1 L.M.
949	. .	120-11.1 note
950	. .	143-135 L.M.
951	. .	160A-216 L.M.
955	. .	160A-385 L.M.
957	. .	18B-700 L.M.
958	. .	105-360 L.M.
959	. .	143-135 L.M.
960	. .	160A-265 L.M.
963	. .	115C-1 L.M.
964	. .	160A-511 L.M.
966	. .	160A-360 L.M.
968	. .	91-2 L.M., 91-3 L.M., 91-4 L.M.
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	2	105-151.13
	3	105-130.36 note, 105-151.13 note
970	1	133-1.1
	2	87-13
971	4	115C-284 note, 115C-295 note
	5	143-1 note
	8	115C-284 note, 115C-295 note
972	1, 2	15A-1343
973	1	143B-470 to 143B-470.5
	2	130A-290
	3-5	130A-293
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	9	143B-216.13
	10	143B-470 note
974	1	136-18.5
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975	1	135-90 to 135-95
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977	. .	14-399 L.M.
978	. .	163-227.2 L.M.
984	. .	163-106 L.M.
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992	1	130A-391
994	1	1-502.1
	2	1-502.1 note
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	6	96-4
	8	143B-480
	11	143B-279, 143B-325 to 143B-327 Repealed
	12	143B-279, 143B-314 to 143B-316 Repealed
	13	143B-342 to 143B-344.2 Repealed
	14	143B-279, 143B-320 Repealed, 143B-321 Repealed
	17	115C-575 Repealed
	19	120-123, 126-64 to 126-68
	20	143B-403.1
	22	143B-83
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996	. .	143-128 L.M., 160A-265 L.M.
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	2	105-436.1 note, 105-446.3:1 note, 105-449.16 note, 105-449.24 note
	3	105-436.1 note, 105-449.16 note, 105-449.24 note
	4	105-436.1 note, 105-449.16 note, 105-449.24 note
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1019	1	128-27, 135-5
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1020	1	136-66.7
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1022	1	131E-200 to 131E-207
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1024	. .	105-188
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1027	. .	113-29.1 L.M.
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	12, 13	135-55
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	16	135-56.1 Repealed.
	17, 18	135-58
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1031	24	135-86 note
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	10.1	115C-468 note, 116-171 to 116-174 transferred to 115C-468 to 115C-471, 115C-468 to 115C-571
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	16	115C-12, 115C-12 note, 115C-47
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	23	115C-109, 115C-124, 115C-128
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	30	143-300.1
	31	143-291 note
	33	126-5 note
	34	115C-325
	36	115D-31 note, 116-53 note
	38	115D-40
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	50	115C-223, 115C-223 note, 116-31 note
	57	116-143.3
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	62	90-85.27 note, 90-85.28 note, 90-85.29 note 90-85.30 note, 90-85.31 note, 180A-61 note
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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

September 15, 1984

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1984 Interim Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina

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